Lex Mundi European Company Global Practice Guide – 2013 Edition

MALTA CHAPTER

GANADO
ADVOCATES

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MALTA

1 NATIONAL IMPLEMENTING LEGISLATION

1.1 Identification

- Although the Companies Act (Chapter 386 of the Laws of Malta, hereinafter the "***Act***" allows the promulgation of regulations providing for the formation, constitution and regulation of European Companies (SE), no such regulations have been published and therefore reliance is placed on Council Regulation 2157/2001 of 8 October 2001 on the Statute for a European Company (hereinafter the "***Regulation***") which is directly applicable in Malta.

- Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees (hereinafter the "***Directive***") has been implemented into Maltese law through Legal Notice 452 of 2007 in the form of the Employee Involvement (European Company) Regulations (Subsidiary Legislation 452.94, hereinafter the "***EI Regulations***").

1.2 Date of implementation

- The Regulation entered into force on 8th October 2001 and has had direct effect in Malta since that date.

- The EI Regulations entered into force on 24th October, 2004.

2 ESTABLISHMENT OF AN SE

2.1 Member State specific (additional) pre-conditions

None specific to SEs.

2.2 Types of companies that can be involved in the various forms of establishment of an SE

a) Formation of an SE by means of a merger: Public Companies;

b) Formation of a Holding SE: Public Companies or Private Limited Liability Companies;

c) Formation of a subsidiary SE: Companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making.

d) Formation of an SE by conversion: Public Companies;

2.3 Possibility for a non-EU company to participate

Yes. A non-EU Company whose head office is situated outside the Community can take part in the formation of an SE if that company is formed under the law of a Member State, has its registered office in that Member States and has a real and continuous link with the same Member State's economy.

2.4 Establishment through merger

No specific provisions are in place regulating this aspect of SE creation and responses to this section are based on the Regulation itself and on Legal Notice 415 of 2007 i.e the Cross-Border Merger of Limited Liability Companies Regulations (Subsidiary Legislation 386.12, hereinafter the "***CBM Regulations***")

a) Type of companies that can be involved in the establishment of an SE through merger

Public Companies.

b) Additional national requirements for pre-merger publication

None specific to SEs.

However, publication, reporting and approval requirements very similar to those set out in Articles 21 – 23 of the Regulation are imposed by the CBM Regulations and must be completed within specific time periods. Indeed, the common draft terms of merger duly signed by at least one director and the company secretary of the Maltese merging company will need to be delivered by that company to the Malta Registrar of Companies ("**MROC**"). Once the MROC is satisfied that the requirements of law in this respect have been complied with he will register the draft terms and publish the relevant statement in the Government Gazette or the MROC website at least one month prior to the general meeting at which the draft terms will be approved. All Members of a Maltese merging company are entitled to inspect the merger documents at the registered office of the company at least one month before the date fixed for that general meeting. Unless certain conditions are fulfilled, the approval of the general meeting must take place through extraordinary resolution at least one month and not later than three months from publication of the draft terms as above and the approving resolution must be delivered to the MROC for registration and for publication of another statement in the Government Gazette or the MROC website and one daily newspaper. On the lapse of the 3 month period (unless contestation is made to the court by any interested party or objection is made by creditors), the MROC issues a Cross-Border Pre-Merger Certificate. Where the SE is to have its registered office in Malta each merging company must submit to the MROC an equivalent of the Pre-Merger Certificate within six months of its issue for issuance by the MROC of a Certificate of Completion of Cross-Border Merger and publication of

a notice in the Government Gazette or the MROC website notifying that the amalgamation has become effective.

See also response to 2.4 (d) below for further pre-merger requirements.

c) Competent Member State authority to object against the participation of company in SE (on public interest grounds).

None specific to SEs.

However, the merger process generally is scrutinised by the MROC who needs to be satisfied that the legal requirements have been met before registering documents and publishing the relevant statements. As mentioned above, contestation by interested parties or objection by creditors within applicable time-periods and on the conditions provided for statutorily is also possible.

d) Review of draft terms of merger/ drawing up of single report to shareholders: possibility of appointment of independent experts by judicial or administrative authority of a Member State, as an alternative to experts operating on behalf of each of the merging companies.

The board of directors of the Maltese merging company must draw up a report intended for the members explaining and justifying the legal and economic aspects of the cross-border merger and explaining the implications for members, creditors and employees. This is to be made available to the members and the employees' representatives or the employees themselves at least one month prior to the general meeting held for the approval of the draft terms of merger. Where the board of directors of the Maltese merging company receives in good time an opinion of the employees' representatives the opinion must be appended to the report.

An experts report examining the common draft terms of merger and specifying whether the share exchange ratio is reasonable must also be drawn up and made available to the members not less than one month prior to the general meeting at which the draft terms will be approved. The experts can act on behalf of each merging company but must be independent therefrom and approved by the MROC. Alternatively, one or more independent experts may be appointed by the MROC at the joint request of the merging companies in order to draw up a single written report for all the merging companies. The above mentioned report is not required if all shareholders and the holders of other securities conferring the right to vote of each of the amalgamating companies have so agreed.

e) Member State faculty to provide special protection for minority shareholders opposing the merger (art. 24 (2))

No provisions specific to SEs but the CBM Regulations do provide that Companies participating in a merger shall be required to redeem the shares held by the dissenting members (i.e. those members who dissent at the general meeting at which the draft

terms are approved), if they so request, on such terms as may be agreed or as the court, on a demand by either the company or the dissenting members, thinks fit to order.

Also, where a cross-border merger by acquisition is carried out by a company which holds 90% or more but not all of the shares and other securities conferring the right to vote at general meetings of the company or companies being acquired, and the acquiring company or the company being acquired is a Maltese merging company, the report by the independent experts on the draft terms and the share exchange ratio would not be required as long as the dissenting minority shareholders of the company or companies being acquired have the right to have their shares purchased by the acquiring company for an agreed consideration corresponding to the fair value of their shares, or in the event of disagreement regarding the fair value of such consideration, as shall be determined by the Court.

Furthermore, the provisions of the Act allowing judicial recourse by shareholders (including minority shareholders) on the basis of unfair prejudice would also apply in this context.

f) Competent authority to issue certificate attesting completion of pre-merger acts and formalities (art. 25 (2))

The MROC.

g) Competent authority and procedure to scrutinize legality of merger, to amend share-exchange ratio, to compensate minority shareholders

The MROC is vested with the function of scrutinising the legality of cross-border mergers where the resulting company is to have its registered office in Malta but scrutiny of the share-exchange ratio lies with the independent experts that may be appointed as described in 2.4 (d) above.

No specific provision is made as to the compensation of minority shareholders. This would fall within the competence of the courts.

h) Special publication and other formalities required for effectiveness against third parties (arts. 28, 29 (3))

The publications set out in the response to 2.4 (b) are applicable.

2.5 Formation of a holding SE

a) Type of company that can be involved in the establishment of a holding SE

Public companies or private limited liability companies.

b) Review of draft terms of formation and drawing up of single report to shareholder appointment of independent experts by judicial or administrative authority (art. 32 (4))

Article 32 of the Regulation has direct effect and would regulate this aspect. Publications of draft terms to be made by the MROC in terms of the Regulation would usually be made on the MROC website and/or the Government Gazzette and sometimes also in a daily newspaper.

c) Member State faculty to provide special protection for minority shareholders opposing the formation of a holding (art. 34)

Not adopted. However, the provisions of the Act allowing judicial recourse by shareholders (including minority shareholders) on the basis of unfair prejudice would also apply in this context.

2.6 Formation of a subsidiary SE

a) Types of companies, firms and other legal entities that may be involved (art. 2 (3))

Companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making.

2.7 Conversion of an existing public limited-liability company into an SE

a) Type of company that may be involved (public limited-liability companies – (art. 2 (4))

Public Companies.

b) Member State faculty to impose special qualified majority for approval of formation of SE by conversion of an existing public limited-liability company (art. 37 (8))

Not adopted specifically in relation to SE's however, the conversion of a public company will entail changes to the Memorandum and Articles of Association of that company and must accordingly be approved by means of an extraordinary resolution. In the case of a public company an extraordinary resolution is one which has been taken at a general meeting of which notice specifying the intention to propose the text of the resolution as an extraordinary resolution and the principal purpose thereof has been duly given and which has been passed by a member or members having the right to attend and vote at the meeting holding in the aggregate not less than seventy-five per cent in nominal value of the shares represented and entitled to vote at the meeting and at least fifty-one per cent, or such other higher percentage as the Memorandum or Articles may prescribe, in nominal value of all

the shares entitled to vote at the meeting: Provided that, if one of the aforesaid majorities is obtained, but not both, another meeting shall be convened within thirty days in accordance with the provisions for the calling of meetings to take a fresh vote on the proposed resolution. At the second meeting the resolution may be passed by a member or members having the right to attend and vote at the meeting holding in the aggregate not less than seventy-five per cent in nominal value of the shares represented and entitled to vote at the meeting. However, if more than half in nominal value of all the shares having the right to vote at the meeting is represented at that meeting, a simple majority in nominal value of such shares so represented shall suffice.

c) Independent experts appointed (in accordance with national provisions) in charge of certifying that the company's net assets are at least equivalent to its capital plus un-distributable reserves.

Article 37 (6) of the Regulation is directly applicable in this respect and the authority approving/appointing the experts would be the MROC.

2.8 Duration of the establishment process

This depends on the type of formation adopted. Aside from the various time periods set out in the responses above and in the Regulation, one must also factor in the time required for review of documents by the MROC and also for the publication of statements in the Government Gazette or daily newspapers. Where objection is made and judicial procedures are instituted, longer time periods need to be factored in.

3 CONTENT OF THE ARTICLES OF ASSOCIATION

3.1 Specific national requirement

A company's Memorandum of Association must comply with the provisions of law of the Act in this respect and mandatorily include certain information (e.g. whether the company is public or private, the name of the company and the name and residence of its subscribers etc.). Articles of Association may be registered with the Memorandum which shall be signed by the subscribers to the Memorandum and prescribe regulations for the company. If Articles are not registered, or, if Articles are registered, in so far as the Articles do not exclude or modify the regulations contained in the First Schedule of the Act, such regulations shall be the regulations of the company in the same manner and to the same extent as if they were contained in duly registered Articles.

3.2 Special rules on the amendment of the Articles of Association

Amendments to a company's Articles of Association must be approved by an extraordinary resolution (see response to 2.7 (b) above for voting thresholds).

3.3 Member state faculty to allow amendments to the Articles of Association be approved by simple majority (instead of general requirement of 2/3 majority of votes cast) in the event of at least 50% of the SE's capital is represented (art. 59 (1))

No specific provision relating to SEs but the faculty exists generally under the Act if the 2/3rd majority is not achieved. See the proviso to the response in 2.7 (b) above in this respect.

3.4 National rules providing for stricter majority rules (than 2/3 majority of votes cast) to approve amendments to Articles of Association (art. 59 (2))

Where separate classes of shares exist and the changes affect the rights attaching to those classes, the changes would normally need to be approved by a separate vote of the class affected.

3.5 Member state faculty to provide for the right of management organ or administrative organ of the SE to proceed to amend the statutes without any decision from the general shareholders meeting to bring the bylaws in accordance with new arrangements for employee involvement determined pursuant to the Employee Involvement Directive (art. 12 (4))

Not adopted.

3.6 Location of registered office (art. 7)

No provisions specific to SEs but the Act requires that the Memorandum and Articles of Association of a company state the registered office in Malta of the company.

4 CAPITAL

4.1 Capital requirements

a) Minimum capital requirement - paying up requirement

As per Article 4 (2) of the Regulation, the minimum Share Capital of an SE must amount to EUR120,000. As per the Act, at least 25% of the nominal value of each share taken up must be paid up in a public company. Shareholders would remain liable up to the unpaid amount on those shares.

b) Special minimum capital requirement for SEs carrying on certain types of activities

Yes.

Companies requiring a licence under the Banking Act (Chapter 371 of the Laws of Malta) must have an initial capital amounting to not less than EUR 5,000,000 euro.

Investment Services Companies are subject to particular minimum share capital statutory requirements ranging from EUR 20,000 to EUR 730,000 depending on the services they provide.

c) Other minimum capital requirements

None.

4.2 Foundation of an SE by non – cash capital contribution

As no regulations specific to SEs have been adopted, the provisions of the Act would apply in this respect.

Accordingly, the consideration for the acquisition of shares in a company whether on original subscription or a subsequent issue, may only consist of assets capable of economic assessment, and furthermore, future personal services and in general any undertakings to perform work or supply services may not be given by way of consideration. Where, on original subscription, the shares are issued for a consideration other than in cash, the full consideration shall be transferred to the company within five years from the date the company is authorised to commence business.

A report on any consideration other than in cash must be drawn up before the company is registered, as the case may be, by one or more experts who are independent of the company and approved by the MROC. The report must be delivered to the MROC for registration before the company is registered, as the case may be and, in default, the MROC shall accordingly refuse to register the company.

Where formation takes place through merger by acquisition or formation of a new company, this type of report is not required in the event of an increase in the issued share capital made to pay the shareholders of the companies being acquired in order to give effect to an amalgamation if an independent expert's report on the draft terms of merger is drawn up.

4.3 Hidden contribution in kind *(Verdeckte Sacheinlage)*

No specific provisions are in place as regards SEs. However, subject to limited exceptions, in terms of the Act a company is prohibited from acquiring, within two years of its authorisation to commence business, any asset belonging to a person who subscribed to the company's Memorandum or who is a member of the company for a consideration which is equivalent to at least one tenth of the issued capital of the company unless certain conditions are satisfied. These include approval by ordinary resolution, the valuation of the asset by independent experts and the drawing up of an experts report in that respect which must be delivered to the MROC. Agreements in contravention of these rules, so far as not carried out, are void

4.4 Capital which substitutes equity *(Eigenkapitalersatz)*

No specific provisions are in place. Arguably, however, it is possible to characterise shareholder loans as loan notes equivalent to securities in the company.

4.5 Repurchase of shares by the SE

In the absence of provisions specifically regulating SEs, the provisions of the Act apply. Accordingly, a company may acquire any of its own shares otherwise than by subscription subject to the satisfaction of certain requirements. These include, *inter alia*, provision being made in the Memorandum or Articles of the company for authorising the acquisition by the company of its own shares; authorisation by means of an extraordinary resolution (see response to 2.7 (b) as regards majority required) a copy of which needs to be delivered to the MROC (this resolution can be done away with in certain cases but where required it must determine the terms and conditions of the acquisitions and in particular the maximum number of shares to be acquired, the duration of the period for which the authorisation is given -which may not exceed eighteen months- and, in the case of acquisition for valuable consideration, the maximum and minimum consideration). Also, the nominal value of the acquired shares, including those previously acquired by the company and held by it, must not exceed ten per cent of the issued share capital; the shares acquired by the Company must be fully paid up; the acquisition can only take place out of the proceeds of a fresh issue of shares made specifically for the purpose, or out of profits available for distribution; and the company must not become the only holder of its ordinary shares. There are instances in which the acquisition can take place without the satisfaction of these conditions (such as when the acquisition takes place in the course of the conversion of the company or a reduction of share capital) however, where the acquisition takes place in contravention of these conditions and the shares are not disposed of within a year of their acquisition, the company must cancel the shares within six months from the expiry of the said year.

During such time as the company holds its own shares those shares will not have any voting rights and if the shares are included among the assets of the company shown in the balance sheet, a reserve of the same amount, unavailable for distribution, must be included among the reserves.

4.6 Hidden repayment of contributions to the shareholders/Equity repayments *(Einlagenrückgewähr)*

No specific provisions as regards SEs have been adopted, however, the provisions of the Act on capital reduction remain applicable.

5 REGISTRATION REQUIREMENTS AND POST ESTABLISHMENT FORMALITIES

a) Registration pre-conditions

Formation by merger

Article 2(1) and Articles 17-31 of the Regulation are directly applicable in this respect and supplemented by similar provisions in the CBM Regulations. See responses to 2.4 (b) and (d) above in this respect.

Formation of a holding SE

Article 2(2) and Articles 32 - 33 of the Regulation are directly applicable in this respect as would the other articles of the Regulation on the structure of the SE. Publications of draft terms to be made by the MROC in terms of the Regulation would usually be made on the MROC website and/or the Government Gazzette and sometimes also in a daily newspaper.

Formation of a subsidiary SE

Article 2(3), Article 35 and Article 36 of the Regulation are directly applicable in this respect as would the other articles of the Regulation on the structure of the SE. Publications relating to company registrations are made by the MROC on the MROC website. Registration of the company normally takes place on presentation to the MROC of the relevant documents and payment of the applicable registry fees.

Formation by conversion of a PLC

Article 37 of the Regulation is directly applicable in this respect and see also responses to 2.7 above (particularly 2.7 (b) as regards the majority required for approval of the conversion).

Publications of draft terms to be made by the MROC in terms of the Regulation would usually be made on the MROC website and/or the Government Gazzette and sometimes also in a daily newspaper.

On completion the MROC would normally issue a new certificate of registration for the company which would reflect its change in status.

6 REQUIREMENT REGARDING THE REGISTERED OFFICE OF THE SE

6.1 Member State faculty requirement that SE's registered seat and head office are located in the same place (art. 7)

Not adopted. Maltese law makes no provision for a legal concept of 'head office' and provide only for registered offices such that companies registered in Malta must have their registered office in Malta.

6.2 Special Member State protection for minority shareholders opposing the transfer of registered office (art. 8 (5))

No provisions specific to SE, however the provisions of the Act allowing judicial recourse by shareholders (including minority shareholders) on the basis of unfair prejudice would also apply in this context.

6.3 Special regime aimed at providing adequate protection of the interests of creditors and holders of other rights in respect of the SE against liabilities arising prior to the publication of the transfer (art. 8 (7) first paragraph) and/or prior to the transfer (art. 8 (7) second paragraph)

Article 8 (7) of the Regulation is directly applicable in this respect. As there are no local law provisions specifically applicable to the transfer of an SE's registered office outside of Malta, the likelihood is that on publication of the proposal to transfer the registered office, the creditors whose debts existed before the publication would be informed of their right to object to the transfer within a specified time period (as is the case under the Continuation of Companies Regulations, Subsidiary Legislation 386.05 which provide for a three month period).

6.4 National legislation re. satisfaction or securing of payments to public bodies (art. 8 (7), para 3)

The MROC will normally require payment of all pending fees and penalties before effecting registration. Specific provision is made requiring payment of fees before registration in the case of merger in the CBM regulations.

6.5 Competent authority to issue certificate attesting the completion of acts and formalities before transfer of seat (art. 8 (8))

The MROC.

6.6 Member State faculty to oppose transfer for public interest reasons, in the event the, transfer would result in a change of applicable law (art. 8 (14))

No provisions have been specifically adopted, however, this would normally fall within the remit of the MROC.

7 MANAGEMENT

7.1 Two-tier system (Management Board/ Supervisory Board)

a) Member State faculty to provide for two-tier system for SEs where normally no two-tier system exist for a public limited company with registered office within such Member State (art. 39 (5))

No legislation has been adopted implementing the two-tier system therefore the provisions of the Regulation would be directly applicable in this respect.

b) Member State rules permitting a minority of shareholders or other persons or authorities to appoint certain members of the Supervisory Board (art. 47 (4))

Not adopted. Maltese law does not provide for a two-tier system and there are therefore no provisions as to the manner of appointment of the Supervisory Board.

c) Relationship of the shareholders to the Supervisory Board/Rights and duties

- **Minimum and/or maximum number of members of the Supervisory Board (art. 40 (3))**

  Article 40 (3) of the Regulation is directly applicable therefore the number of members needs to be laid down in the SE statutes given that Maltese law does not provide for a two-tier system.

- **Right of each member of Supervisory Board to obtain certain information from the Management Board (art. 41 (3))**

  Not adopted.

d) Relationship of the shareholders to the Management Board/Rights and duties

- **Member State faculty to require or permit the bylaws to provide that members of the Management Board must be appointed and removed by the Meeting (instead of Supervisory Board) (art. 39 (2))**

  Not adopted. The Act caters for a one-tier system whereby the management organ would be the Board of Directors with directors appointed by the general meeting. In case a two-tier system is adopted, the first part of Article 39 (2) of the Regulation would be directly applicable.

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e) Minimum and/or maximum number of members of Management Board (art. 39 (4))

According to the Act, Public Companies must have at least two Directors and since the management organ (whether in a two-tier system which is not provided for under Maltese law or the administrative organ in a one-tier system which is the system adopted under the Act) would be the Board of Directors the minimum number of members of the management organ of an SE would need to comply with this requirement.

f) Time limit on period during which a member of the Supervisory Board may act as a member of the Management Board in the event of a vacancy (art. 39 (3))

Article 39 (3) of the Regulation is directly applicable and no time limit is catered for under Maltese law.

g) Member State faculty to provide that the Supervisory Board make itself certain categories of transaction subject to its authorisation

Not adopted. This can be set out in the SE's statute.

h) Relationship of the Supervisory Board to the Management Board/Rights and duties

The Regulation is directly applicable in this respect and since Maltese law does not provide for a two-tier system this would also be determined by the SE's statute.

7.2 One-tier system (Board-system)

a) Member State faculty to provide for one-tier system for SEs where normally no one-tier system provisions exist for a public limited company with registered office within such Member State (art. 43 (4))

This does not apply as the Act regulates a one-tier system.

b) Minimum number of members of Board of Directors (art. 43 (2))

No provisions specific to SEs, however, public companies must have at least 2 directors.

c) Relationship of the shareholders to the Board/Rights and duties

The general rule is that directors are bound to act honestly, in good faith and in the best interests of the company. The business of the company is managed by the directors of the company who may exercise all such powers of the Company as are not required to be exercised by the general meeting in terms of the Act or the company's statute. Indeed, the statute of a company may set out various matters as

being reserved to shareholders. The Act lists several items which require shareholders' approval through extraordinary resolution including, *inter alia*, amendments to the Memorandum and Articles of Association (save for a change in registered office), a reduction in share capital and authorisation to the company to buy its own shares. However as mentioned above, any member is empowered by the Act to institute judicial proceedings in cases where the affairs of the company have been or are being or are likely to be conducted in a manner that is, or that any act or omission of the company have been or are or are likely to be, oppressive, unfairly discriminatory against, or unfairly prejudicial, to a member or members or in a manner that is contrary to the interests of the members as a whole.

d) Relationship of the Board to the Executive Directors/Rights and duties

The distinctions between executive and non-executive directors under Maltese law are only drawn for practical purposes and do not give rise under the the Act to differing rights or obligations. They in fact have the same duties and responsibilities in terms of law. The Listing Rules issued by the Malta Financial Services Authority regulating the listing of companies on the Malta Stock Exchange do shed some light in this respect. They describe non-executive directors as being directors who are not involved in the daily management of the company who usually take on the role of overseeing executive or managing directors and dealing with situations involving conflicts of interests

e) Relationship of the shareholders to the Executive Directors/Rights and duties

Please see response to 7.2 (d) in this respect.

8 GENERAL MEETING OF SHAREHOLDERS

8.1 Identification of matters in respect of which the general meeting of shareholders has sole responsibility

a) Pursuant to Member state law governing a public limited-liability company

The Act lists several items which require shareholders' approval through extraordinary resolution including, *inter alia*, amendments to the Memorandum and Articles of Association (save for a change in registered office), a reduction in share capital; authorisation to the company to buy its own shares; reduction in share capital, the authority of directors to issue shares, relaxation of statutory pre-emption rights on the particular allotments of shares in public companies, variation of rights attaching to shares, the winding up of the company.

b) Pursuant to Member state law implementing Directive 2001/86/EC

None.

8.2 Member state law regarding

a) The organisation and conduct of general meetings

Articles 52 – 60 are directly applicable in this respect.

As regards matters specific to Maltese law:

- See response to 8.1 (a) above as regards matters requiring the decision of the general meeting.

- In terms of the Act, the first general meeting may in fact be held at any time in the 18 months following an SE's incorporation and in such case it need not hold its first Annual General Meeting in the year of its registration or in the following year. Otherwise the general rule is that there must be an Annual General Meeting and not more than 15 months shall lapse between the date of one Annual General Meeting of the company and that of the next.

- Given that the rules in Article 57 of the Regulation are without prejudice to any national provisions which allow the shareholders themselves to convene general meetings it should be noted that in terms of the Act, where a meeting has been duly requisitioned by a member or members but the directors have not proceeded to convene the meeting within 21 days from the date of the deposit of the requisition, the requisitionist or requisitionists may convene a meeting in the same manner, as nearly as possible, as that in which meetings are to be convened by the directors, but a meeting so convened shall not be held after the expiration of three months from the date of the deposit of the requisition.

Also, a general meeting of a company shall be deemed not to have been duly convened unless at least 14 days notice has been given in writing to all persons entitled to receive such notice provided that members entitled to attend and vote at the meeting may consent to shorter notice having been given.

A procedure also exists for the convening of meetings by order of the court (of its own motion, or on application of either of the parties to proceedings pending before it or, if no proceedings exist, of any director or any member of the company who would be entitled to vote thereat) if for any reason it is impracticable to call a meeting of a company in any manner in which meetings of the company may be called.

Voting procedures and Presence and voting of Quorum

Unless otherwise provided in the company's Articles:

- Notice of any general meeting of a company shall be given to every member of the company.

- Voting may be by show of hands or by proxy.

- Two members entitled to attend and vote at the meeting shall be a quorum.

- Every member shall have one vote in respect of each share or each euro of stock held by him unless otherwise provided in the terms of issue of such shares or stock.

In terms of the Act, decisions at a general meeting are taken through ordinary or extraordinary resolutions.

An ordinary resolution is one which is passed by a member or members having the right to attend and vote holding in the aggregate shares entitling the holder or holders thereof to more than fifty per cent (50%) of the voting rights attached to shares represented and entitled to vote at the meeting, or such other higher percentage as the Memorandum or Articles may prescribe. .

See response to 2.7(b) above for majority thresholds of extraordinary resolutions

8.3 Member State faculty to provide for right of shareholders holding a smaller proportion than 10% of the SE's subscribed capital (art. 55 (1)) to convene a general meeting and draw up agenda, right to put additional items on agenda

No Specific provisions have been adopted, however, strictly speaking, the threshold set under Maltese law for requisitioning meetings may in actual fact result in requiring a smaller proportion than that set by the Regulation. The reason for this is that whereas the Regulation refers to 10% of the SE's **subscribed**, whereas the act requires a member or members holding not less than 10% of the **paid up capital carrying voting rights.**

9 POSSIBILITY FOR A COMPANY OR ANOTHER LEGAL ENTITY BE A MEMBER OF THE SE'S (ONE-TIER OR TWO-TIER) ORGANS (art. 47 (1))?

No specific provision has been made as regards SEs but this is possible in terms of the Act in the case of public companies.

10 PARTICIPATION OF THE EMPLOYEES IN THE DECISIONS OF THE MANAGEMENT OF AN SE

As mentioned above this matter is regulated by the Regulation itself and also through the EI Regulations which serve to implement the Directive.

10.1 Representation of representatives of the work force on the Board/ Supervisory Board

Employees of companies involved in the formation of an SE may appoint members of the Supervisory Board and administration organ in accordance with any employee participation agreement between the negotiating body (as defined by the EI Regulations) and the SE, if such participation agreement exists or in accordance with the standard rules annexed to the EI Regulations which effectively replicate the Annex to the Directive.

10.2 How many representatives of the work force are appointed

The EI Regulations replicate the standard rules in the Directive or the employee involvement agreement. Accordingly:

- In the case of an SE established by transformation, if the rules of a Member State relating to employee participation in the administrative or supervisory body applied before registration, all aspects of employee participation shall continue to apply to the SE.

- In other cases of the establishing of an SE, the employees of the SE, its subsidiaries and establishments and or their representative body shall have the right to elect, appoint, recommend or oppose the appointment of a number of members of the administrative or supervisory body of the SE equal to the highest proportion in force in the participating companies concerned before registration of the SE.

- If none of the participating companies was governed by participation rules before registration of the SE, the latter shall not be required to establish provisions for employee participation.

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

Every member of the administrative body or, where appropriate, of the supervisory body of the SE who has been elected, appointed or recommended by the representative body or, depending on the circumstances, by the employees, shall be a full member with the same rights and obligations as the members representing the shareholders, including the right to vote.

10.3 Which body appoints the representatives of the employees?

In terms of the standard rules in the EI Regulations, the members of the representative body are elected or appointed in proportion to the number of employees employed in each Member State by the participating companies and concerned subsidiaries or establishments, by allocating in respect of a Member State one seat per portion of employees employed in that Member State which equals 10%, or a fraction thereof, of the number of employees employed by the participating companies and concerned subsidiaries or establishments in all the Member States taken together.

10.4 Rights and duties of the representatives of the work force

See Response to 10.1 above.

11 TAXATION

11.1 Taxes and registration fees upon establishment of an SE

No taxes are charged on the establishment of an SE in Malta. A registration fee is paid to the Malta Registry of Companies based on the amount of the authorised share capital of the SE.

11.2 Corporate and income taxes

11.2.1 Taxation of the SE (resident and non-resident): basic principles

General principles

For the purposes of Maltese legislation, an SE that is registered in Malta is treated like a public company that is incorporated under the laws of Malta.

In terms of Maltese principles of taxation, a company that is incorporated in Malta is considered to be resident and domiciled in Malta irrespective of where the place of management and control is situated. Accordingly, an SE that is incorporated in Malta is taxable in Malta on all its income and capital gains arising on a world-wide basis.

An SE that is not incorporated in Malta but is managed and controlled from Malta is taxable in Malta on any income and capital gains arising in Malta and on any income arising outside Malta which is remitted to Malta.

An SE that is not incorporated in Malta nor is managed and controlled from Malta is only taxable in Malta on any income or capital gains derived in Malta, or if it has a permanent establishment situated in Malta. If the non-resident SE has a permanent establishment situated in Malta it will be taxable in Malta on the profits derived by the SE which are attributable to the permanent establishment in Malta.

The corporate tax rate in Malta is 35%. However, the availability of tax refunds to shareholders of a company upon a distribution of profits by way of dividends to its shareholders may, in certain cases, significantly lower the effective tax burden in Malta. Tax is charged on the accounting profits of the company adjusted by any expenses which are not allowed as a deduction for tax purposes. In terms of Maltese tax legislation, expenses are allowed as a deduction against income to the extent that they are wholly and exclusively incurred in the production of the income.

Participation exemption

A company registered in Malta may also benefit from a participation exemption on any income derived from a participating holding and on any gains derived from the disposal of such participating holding. One of the most common criteria for a holding to qualify as a participating holding is the holding of at least 10% of the equity shares of another company subject to satisfaction of anti-abuse test. The profits of a company which benefit from the participation exemption will remain exempt in the hands of the shareholders upon a distribution by way of dividends.

Double taxation relief

A company resident in Malta is also entitled to claim double taxation relief on any income or gains derived by the company which has suffered tax outside Malta. Maltese legislation provides for four types of double taxation relief being (i) Treaty Relief, (ii) Unilateral Relief, (iii) Commonwealth relief, and (iv) Flat Rate Foreign Tax Credit.

Malta has more than 65 double taxation treaties into force as of this date, and this makes Malta an attractive jurisdiction for companies to be established in Malta.

Relief for trading and capital losses

Any trading losses incurred by a company resident in Malta are allowed as a deduction against any trading profits or capital gains. Such losses are calculated without reference to depreciation. Where the trading losses cannot be set off against capital gains or income from other sources in the same fiscal year, they can be carried forward and set off against profits or gains in subsequent years.

Capital losses incurred by a company resident in Malta are also allowed as a deduction against capital gains derived by the company, and any excess capital losses can be carried forward for subsequent years.

Trading and capital losses may also be surrendered to a group company in terms of the group loss relief provisions subject to the satisfaction of certain conditions.

If the claimant company does not have enough profits to absorb the loss claimed in the year in which it is claimed, the claimant company may set off the excess loss against the income of subsequent years.

Capital allowances

Maltese legislation allows for a deduction of wear and tear capital allowances in respect of expenditure incurred on qualifying capital assets. Such wear and tear allowances replace the accounting depreciation that is provided for on the assets of the company.

Withholding taxes

No withholding tax obligations are applicable to an SE resident in Malta on distribution of dividends made to non-resident shareholders.

11.2.2 Taxation of the shareholders

Dividend distributions

Dividends received from an SE resident in Malta by a non-resident shareholder are not subject to any withholding taxes in Malta.

Furthermore, Malta operates a full imputation system of taxation, whereby shareholders of companies resident in Malta are entitled to a tax credit for the tax suffered by the company paying the dividend. Any shareholders' tax liability in respect of the dividends received from the Malta resident company is offset by the amount of tax suffered by the company on the profits distributed through the dividend payment. Thus, no further tax is payable by the shareholders. Indeed, individual shareholders do not need to declare the dividend received from a Maltese resident company in a tax return in Malta.

Shareholders of Maltese companies are also entitled to refunds of all or part of the tax paid by the SE that is tax resident in Malta. In order to qualify for the refunds, the shareholders must, inter alia, be registered with the Malta Commissioner of Inland Revenue in the prescribed manner for such purpose.

Tax on capital gains

Any gains or profits derived by a person not resident in Malta on the transfer of shares of an SE is not subject to tax in Malta provided that:

- the company whose shares are being transferred does not own, directly or ` indirectly, any immovable property situated in Malta; and
- The beneficial owner of the gain is not resident in Malta and is not owned and controlled by, directly or indirectly, nor acts on behalf of individuals who are ordinarily resident and domiciled in Malta.

11.3 Taxes and registration fees related to a capital increase of an SE

An increase in the issued share capital of an SE registered in Malta does not give rise to any income tax or stamp duty implications in Malta as long as the percentage holding by the shareholders of the SE before and after the issue of the new shares remains the same.

Where an increase in the issued share capital of an SE registered in Malta results in a change in the percentage holding of the shareholders of the SE, it may give rise to a deemed transfer of shares for any shift in value between shareholders. However, any deemed capital gains derived by non-Maltese resident shareholders on the deemed transfer of shares are exempt from tax in Malta so long as:

(a) the SE does not own, directly or indirectly, any immovable property situated in Malta; and
(b) the non-Maltese resident shareholder is the beneficial owner of the gain and is not acting for and on behalf of an individual ordinarily resident and domiciled in Malta.

No stamp duty is payable on any deemed transfer of shares for any shift in value between shareholders as a result of a change in the issued share capital where the SE holds a stamp duty exemption. An SE registered in Malta would qualify for a stamp duty exemption if, inter alia, that SE carries on business or has business interests to the extent of more than 90% outside Malta.

11.4 Loss compensation concerning foreign branch offices (*Verlustausgleich für Verluste ausländischer Betriebsstätten*)

Surrendering of tax losses is applicable only between companies of the same group. Companies are considered to be within the same group for the purposes of the group loss relief if:

- They are resident in Malta and neither is tax resident in any other country; and
- If one company is a fifty one per cent (51%) subsidiary of the other, or both companies are fifty one per cent (51%) subsidiaries of a third company resident in Malta.

11.5 Group taxation: two or more companies are treated as one for tax purpose (*Gruppenbesteuerung*)

Recent amendments to Maltese tax legislation provide for bodies of persons under common ownership to be entitled to elect to compute and bring to charge their chargeable income or losses on a collective basis, and consequently carrying out their tax obligations under the Income Tax Acts as if they were a single body of persons.

This election is subject to applicable terms and conditions as may be prescribed by the Maltese tax authorities.

Apart from this single taxable person basis of taxation, there are a number of exemptions applicable to companies forming part of the group, such as the surrendering of trading and capital losses between one company and another forming part of a group, and exemptions in relation to the transfer of immovable property and shares between group companies.

11.6 International and national participation exemption rules in the respective country (*Internationales und Nationales Schachtelprivileg*)

An SE resident in Malta may benefit from the participation exemption on any dividends derived from a participating holding, and on any gains derived from the disposal of such participating holding.

A participating holding is considered to exist if the SE, inter alia:

- Holds at least 10% of the equity shares in another company; OR
- Is an equity shareholder which holds an investment representing a total value of €1,164,000 in another company and such investment is held for an uninterrupted period of not less than 183 days.

A holding in equity shares of another company or an equity shareholder is considered to exist where the SE is entitled to at least two of the following equity holding rights, being:
a. a right to vote;
b. a right to profits available for distribution;
c. a right to assets available for distribution on winding up.

Furthermore, for the participation exemption to be available to an SE, the holding must also satisfy an anti-abuse test as outlined below in respect of any dividends paid to the SE but not in relation to any capital gains arising from a disposal of such holding.

For the anti-abuse test to be satisfied at the Malta level, it must be shown that the foreign company in which the participating holding is held satisfies any ***ONE*** of the following 3 conditions, namely:

(1) it is resident or incorporated in a country or territory which forms part of the European Union;
OR
(2) it is subject to any foreign tax of at least fifteen per cent (15%);
OR
(3) it does not have more than fifty per cent (50%) of its income derived from "passive interest or royalties".

11.7 Tax consequences of the establishment of a SE

Formation by a cross border merger

Malta has adopted Council Directive 90/434/EEC 1990 as amended by Council Directive 2005/19/EC into the Income Tax Acts, and accordingly all the provisions laid down in the Directive are applicable to the formation of an SE by a cross border merger.

The transfer of assets and liabilities as a result of a cross-border merger should not give rise to any taxation on capital gains. This applies provided that the transferred assets and liabilities continue to remain attached to a permanent establishment ("***PE***") of the receiving company in Malta.

In case of a merger involving the Maltese disappearing company, the shareholders of the said Maltese company carry over the original tax base of their old shares into the shares of the EU receiving company. An interesting aspect of this rule is that, unless the shareholders are Maltese persons, Malta will lose its right to tax the hidden capital gains arising to the shareholders since in case of the eventual sale of shares in the EU receiving company, there will be no link with Malta for Malta to be able to exercise its taxing rights.

In the case of a merger involving a Maltese surviving company, the merger will in principle not trigger any tax implications for the existing shareholders since they would not be disposing of their shares. The issue of shares to the new shareholders will also not give rise to any income tax implications. However, anti-dilution provisions provide that where the market value of shares held by a person in a company is reduced as a result of a change in the issued share capital, such dilution is treated as a deemed transfer of shares by the shareholder whose shareholding has been diluted. These anti-abuse provisions will not apply where, inter alia, the surviving company does not own, directly or indirectly, immovable property situated in Malta and it can be shown that the change is effected for bona fide commercial reasons and does not from part of a tax-avoidance scheme.

Formation of a Holding SE

The formation of a holding SE by exchange of shares should not give rise to any Maltese income tax implications if the exchange of shares does not produce any change in the individual direct or indirect beneficial owners of the companies involved or in the proportion in the value of each of the companies involved represented by the shares owned beneficially, directly or indirectly, by each such individual.

Furthermore, the transfer of shares in one company for shares in an SE should still not give rise to any tax on any capital gain made upon the exchange of shares if:
a) the transferor is a person not resident in Malta; and

b) the beneficial owner of the gain is a person not resident in Malta, and such person is not owned and controlled by, directly or indirectly, nor acts on behalf of an individual who is ordinarily resident and domiciled in Malta; and
c) the company does not own any immovable property situated in Malta.

Formation of Subsidiary SE

The formation of a subsidiary SE would result in the subscription of shares in the new SE company upon its incorporation. No income tax in Malta should be applicable on the subscription of new shares in the SE subsidiary.

Formation by transformation

Similarly, the conversion of an existing public limited liability company into an SE should not give rise to any tax implications in Malta.

11.8 Taxes related to the transfer of a SE´s registered office (moving in – exit)

The transfer of the registered office of an SE from one EU Member State to another EU member state does not result in either the winding up of the SE in the original Member State nor does it result in the creation of a new legal person in the new Member State.

No taxes are suffered in Malta upon the transfer of a SE's registered office into or out of Malta.

However, once an SE transfers its registered office into Malta, such SE would become a company resident and domiciled in Malta for Maltese income tax purposes and be taxable in Malta on a world-wide basis – refer to paragraph 11.2.1 above.

The shareholders of an SE which has transferred its registered office to Malta will not be subject to any Maltese tax upon the eventual disposal of their holding in the SE company if:

- The shareholder is a person not resident in Malta; and
- the beneficial owner of the gain is a person not resident in Malta, and such person is not owned and controlled by, directly or indirectly, nor acts on behalf of an individual who is ordinarily resident and domiciled in Malta; and
- the company does not own any immovable property situated in Malta.

11.9 Corporate reorganisation measures that are free from corporate income tax e.g. merger, contribution in kind, splitting, spin off.

a) What corporate reorganisation measures exist and which of them can be effected without triggering corporate income tax?

There are various tax exemptions on corporate reorganisations. If carefully structured, corporate reorganisations may be made without any tax burden in Malta. Furthermore, the Commissioner of Inland Revenue may also issue tax rulings to one or more companies involved in a merger or a division confirming that no tax liability is due on the reorganisation provided that the Commissioner is satisfied that the transactions are to be effected for bona fide commercial reasons and do not form part of a scheme or arrangement the main purpose of which, or one of the main purposes of which, is the avoidance of liability to duty or tax.

b) Other costs, fees, duties and taxes related to reorganisation measures

Income tax and stamp duty may be due upon a reorganisation if no specific exemption is applicable for such reorganisation, or where the Commissioner of Inland Revenue does not issue a tax ruling confirming that income tax and stamp duty are not applicable.

12 WINDING UP, LIQUIDATION OF AN SE

12.1 Preconditions

As no specific winding up, liquidation and insolvency provisions have been promulgated in relation to SE's locally, the Act would apply to the liquidation of an SE having its registered office in Malta and this in accordance with Article 63 of the Regulation.

The Act generally provides for the following modes of dissolution and winding up procedures::

a) voluntary dissolution and winding-up – this may be a members' winding up or a creditors' winding-up; and
b) dissolution and winding-up by the Court;

The Act regulates each procedure extensively and the below is a non-exhaustive overview of the basic, principal elements.

a) Voluntary dissolution and consequential winding up.

Voluntary dissolution and winding-up takes place through extraordinary resolution of the general meeting and as mentioned above can be a members' dissolution and winding-up or a creditors' dissolution and winding-up.

i. *Members' voluntary dissolution and winding-up*

An extraordinary resolution is required resolving on (a) the voluntary dissolution of the company and (b) the nomination of a liquidator to wind up the company's affairs and distribute its assets. In the case of a members' winding up, the person nominated is automatically appointed as liquidator and a Form L needs to be submitted to the MROC within fourteen (14) days from the appointment. Notice of this extraordinary resolution must be filed with the MROC within fourteen (14) days from its adoption through the statutory Form B(1) signed by a director of the Company.

The director/s of the company must also make a declaration of solvency (within the one (1) month immediately preceding the date of the passing of the extraordinary resolution mentioned above). This must be notified to the MROC through the filing of the statutory Form B2. This declaration will state that the director/s have made a full enquiry into the affairs of the company and that having so done they have formed the opinion that the company will be able to pay its debts in full within a period not exceeding twelve (12) months from the date of dissolution as specified in the declaration of solvency. The law contemplates stiff penalties (fines and/or imprisonment) if the director/s making the declaration of solvency did not have reasonable grounds to form the said opinion.

The Declaration of Solvency must be accompanied by a statement of the Company's assets and liabilities, which statement is not to be older than three (3) months before the date of the declaration of solvency.

The Declaration of Solvency, the Statement of Assets and Liabilities and notice of the extraordinary resolution must be forwarded to the Registrar of Companies for registration within fourteen (14) days from the date of the extraordinary resolution.

The liquidator must prepare an account showing how the Company has been fully wound up and how its property has been disposed of. He must also draw up a Scheme of Distribution showing the amount due in respect of each share from the Company's assets. The accounts are then audited, and a general meeting is convened for the purpose of laying before it such accounts and scheme of distribution. A return is then filed with the MROC for publication of the relevant statement. This sets off a three month period within which any creditors whose debts existed prior to the publication of that statement can file their claims trough a court applications. If no such claims are made the MROC will then be able to strike the company off the register on the lapse of the 3 months.

ii. *Creditors' voluntary dissolution and winding-up*

If a Declaration of Solvency is not issued, then the company would need to go through a creditors' voluntary dissolution and winding up.

A creditors' meeting must be summoned by the directors not later than fourteen (14) days after the date of the extraordinary resolution approving the winding-up and this with at least 7 days notice to creditors and advertised in at least one local daily newspaper. The director/s must present to the meeting a full statement of the position of the company's affairs together with a list of the company's creditors and an estimated amount of their claims.

Each of the company and the creditors' meeting may appoint a liquidator, however, if the person appointed by the creditors is different from that appointed by the company, the person appointed by the creditors shall be the liquidator.

The liquidator must prepare an account showing how the company has been fully wound up and how its property has been disposed of. He must also draw up a scheme of distribution showing the amount due in respect of each share from the company's assets. The accounts are then audited, and separate meetings of all the shareholders and creditors are convened for the purpose of laying before them such accounts and scheme of distribution.

The accounts, scheme of distribution and auditor's report must then be filed with the MROC within seven days from the date of the later meeting. On the expiration of three months from the publication of a notice by the Registrar, the Company will be struck off unless during that three month period the Court makes an order to defer the date of striking-off (on the application of the creditors or any person having an interest).

b) Court dissolution and consequential winding up

A company **may** be dissolved and wound up by the Court:

- if it has passed an extraordinary resolution for dissolution and consequential winding up by the Court; or
- if the business of the company is suspended for an uninterrupted period of 24 months; or
- if the company is unable to pay its debts.

The Act further prescribes various instances where the company must be dissolved by the Court, but.

A company **shall** be dissolved by the Court:

1. when the number of members of the company is reduced to below two and remains so reduced for more than six months;
2. when the number of directors is reduced to below the minimum prescribed by law and remains so reduced for more than six months;
3. when the Court is of the opinion that there are grounds of sufficient gravity to warrant the dissolution and consequent winding up of the company;

4. when the period, if any, fixed for the duration of the company or the event occurs, if any, on the occurrence of which the Memorandum and Articles provide that the company is to be wound up and the general meeting has not before the expiry of the period or the occurrence of the event passed a resolution to be wound up voluntarily.

The court in these cases has discretion to determine whether the company be wound up by the Court or voluntarily.

An application to the Court to order the winding up of a company may be made by any of the following:

- the company in general meeting;
- the board of directors;
- any creditor or creditors;
- any debenture holder;
- any contributory or contributories (if certain conditions are met);
- any shareholder or director in certain cases;
- the official receiver;
- the MROC in certain cases.

On the making of a winding up application, a copy thereof shall be forwarded to the Registrar of Courts for registration.

The Court may, on the hearing of a winding up application:
(a) dismiss the application; or
(b) make an order acceding thereto (a "winding up order"); and in any case
(c) make such other orders including provisional orders; and adjourn the hearing conditionally or otherwise as it thinks fit.

Where the court makes a winding up order or appoints a Provisional Administrator, the Official Receiver must receive a statement of the company's affairs within twenty one (21) days from the relevant date or when otherwise specified by the Official Receiver, submitted and verified by affidavit by the directors of the company and such other persons as the Official Receiver may require (falling within the categories set by the Companies Act). This statement should outline the particulars pertaining to the assets and liabilities of the Company, the identity and particulars of its creditors, the nature of their claims and particulars of any security held by them, and any further information the Official Receiver may require.

After submission of this statement, or in the event the Court orders that no statement is to be submitted, as soon as is practicable after the court has issued its winding up order, the Official Receiver must submit to the court his own preliminary report, covering the Company's capital structure, its assets and liabilities and causes of its failure.

On a winding up order being made, the Official Receiver becomes the liquidator and he continues to act until another person becomes liquidator. The Official Receiver may call meetings of the creditors and contributories for the purposes of choosing a liquidator in place of the Official Receiver but is obliged to do so if requested by one-fourth in value of the company's creditors. Where no liquidator is appointed by duly convened meetings of the creditors, (or if it were the case, the contributories) the Official receiver may apply to the court to appoint a liquidator. The Official Receiver also acts as liquidator during any vacancy. The liquidator will proceed to wind-up the affairs of the company.

When the affairs of the company have been completely wound up and the requirements of law have been complied with, the court shall make an order that the name of the company be struck off the register from the date of the order. A copy of the order shall within fourteen (14) days from the date thereof be forwarded by the Registrar of Courts to the Registrar who shall comply therewith.

12.2 Duration of the liquidation process

This depends on multiple factors, primarily on the method of dissolution and winding up employed. Voluntary winding up tends to be the quicker option but this again depends on the extent of the company's business and assets. Court winding-up or recourse to the court in other modes of winding-up will inevitably lengthen the procedure.

12.3 Member State measures and judicial remedy system in the event SE fails to regularise its position when no longer in compliance with requirement that registered office be located within Community in the same Member State as its head office (art. 64 (2))

No specific provisions have been adopted. However the provisions of the Act allowing judicial recourse by shareholders (including minority shareholders) on the basis of unfair prejudice would also apply in this context.

13 CONVERSION OF AN SE INTO A PUBLIC LIMITED LIABILITY COMPANY GOVERNED BY THE LAW OF THE MEMBER STATE IN WHICH REGISTERED OFFICE IS LOCATED

As there is no subsidiary legislation regulating SE's specifically, conversion of SEs into local public companies is not specifically regulated locally and Article 66 of the Regulation would apply.

As with the conversion of a public company into an SE the inverse process will also require a change in the company's Memorandum and Articles of Association so that they will include all those changes required by the provisions of the Act for the SE to hold the status of a public company. The conversion also needs to be approved by an extraordinary resolution.

13.1 Independent experts appointed by competent authority to which an SE being converted into a public limited-liability company is subject to certify that the company has assets at least equivalent to its capital.

Article 66 (5) of the Regulation is directly applicable in this respect. The experts would be appointed or approved by the MROC.

14 SPECIAL PROTECTION OF RIGHTS OF MINORITY SHAREHOLDERS

14.1 In the event of formation of an SE by merger (art. 24 (2))

See responses to 2.4 (e) above.

14.2 In the event of the formation of a holding SE (art. 34)

See response to 2.5 (c).

14.3 In the event of a conversion/transformation of an existing public limited-liability company (art. 37)

Not adopted. However, the provisions of the Act allowing judicial recourse by shareholders (including minority shareholders) on the basis of unfair prejudice would also apply in this context.

Also, the Act provides where the commercial partnership to be converted is a company, whether public or private, it is required to redeem the shares held by the dissenting members, if they so request, on such terms as may be agreed or as the court, on a demand of either the company or the dissenting members, thinks fit to order. Although no specific provision is made locally specifically in relation to SEs, the likelihood is that this requirement will kick in on a conversion of an existing public company to and SE.

14.4 In the event of a transfer of the registered office (art. 8 (5))

Not adopted. However, the provisions of the Act allowing judicial recourse by shareholders (including minority shareholders) on the basis of unfair prejudice would also apply in this context

15 MEMBER STATE PUBLICATION REQUIREMENTS FOR DOCUMENTS AND PARTICULARS CONCERNING THE SE TO BE PUBLICISED UNDER THE REGULATION

As mentioned above, where the Regulation does not specify methods of publication, publication by the MROC would usually be made through the MROC website and/or the Government Gazzette and sometimes also in a daily newspaper In addition to the publication requirements already referred to above, the Act requires that a number of changes affecting the company are publicised and this occurs through the filing of the

relevant statutory form of notification with the MROC for registration. The matters to be notified in this manner include changes to the registered office of the company, changes in the company's legal and judicial representation, allotments of shares, share transfers and pledges granted over shares in the company.