



28 November 2007

**Final Proposal for a Regulation  
on the Statute of the European Mutual Society (EMS)  
A Working Document from the European mutual sector**

REGULATION (EC) No xxxx of the Council of yyyy on the Statute for a European Mutual Society

THE COUNCIL OF THE EUROPEAN UNION,  
Having regard to the Treaty establishing the European Union,  
and in particular Article 308 thereof,  
Having regard to the proposal from the Commission for a Regulation on the Statute for a European mutual society (1991/0390/(COD))<sup>1</sup>  
Having regard to the Communication of the Commission of 27 September 2005 to the Council and the European Parliament on the outcome of the screening of legislative proposals pending before the Legislator (COM(2005)0462),  
Having regard to the withdrawal of Commission proposals following screening for their general relevance, their impact on competitiveness and other aspects published in the official journal of the European Union on 17 March 2006 (2006/C 64/03),  
Having regard to the opinion of the European Parliament  
Having regard to the opinion of the European Economic and Social Committee

Whereas:

- 1 The Commission's Communication, in September 2005, on the outcome of the screening of legislative proposals pending before the Legislator lead to the withdrawal, in March 2006, of the draft proposal for a Regulation on the Statute for a European mutual society; whereas, however, the Commission committed to reconsider some of these proposals in the light of further analysis and to reconsider the need for a legislative intervention in the light of the results of a comprehensive impact assessment.
- 2 During the past two years, the European Parliament adopted no less than six resolutions calling for the adoption of a Regulation on the European mutual society statute:
  - In its Resolution of 15 December 2005 on the Commission's legislative and work programme for 2006<sup>2</sup> (Communication "Unlocking Europe's full potential" (COM(2005)0531)), the European Parliament requested that the Commission not withdraw its proposals on a European mutual society and on a European association.

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<sup>1</sup> OJ C 99, 21.4.1992, p. 40.

<sup>2</sup> P6\_TA(2005)0524

- In its Resolution of 16 May 2006 on the “Outcome of the screening of legislative proposals pending before the legislator”<sup>3</sup>, the European Parliament welcomed the fact that the Commission takes account of the objectives of the Lisbon Agenda before proposing that a legislative proposal should be withdrawn; regretted therefore that the Commission has withdrawn the proposal for a regulation on the Statute for a European mutual society despite the fact that it is one of the key elements of the Lisbon Strategy; expressed its surprise that the Commission adduces the diversity of national legislations as an argument against Community initiatives; called on the Commission, therefore, to adopt an initiative before the end of the year to enable a Statute for a European mutual society and a European association to be drafted.
  - In its Resolution of 4 July 2006 on Recent developments and prospects in relation to company law<sup>4</sup>, the European Parliament strongly deplored the fact that the Commission had already decided to withdraw the two proposals for a regulation on a Statute for a European association (1991/0386(COD)) and for a regulation on a Statute for a European mutual society (1991/0390(COD)) and the two proposals for directives supplementing those Statutes with regard to the involvement of employees (1991/0387(COD) and 1991/0391(COD)); noted, however, that, in its 2003 Action Plan, the Commission announced its intention actively to support the legislative process undertaken in relation to these statutes, in response to the desire expressed by Parliament for significant attention to be given to the development of new legal forms of enterprises; regards these proposals as useful instruments for the development of economic activity throughout Europe by associations and mutual societies; called on the Commission to submit new proposals for statutes for European mutual societies and for European associations.
  - In its Resolution of 6 September 2006 on a European social model for the future<sup>5</sup>, the European Parliament called on the Commission to respect the social economy and to present a communication on this cornerstone of the European social model, as well as to introduce a statute for a European mutual society and for a European association.
  - In its Resolution of 13 December 2006 on the Commission legislative and work programme for 2007<sup>6</sup>, the European Parliament asked the Commission to inform Parliament why it chose not to include the following legislative initiatives in its 2007 work programme, as requested by its committees: (...) a new proposal on a European mutual society and a European association.
  - The European Parliament, in its Resolution of 4 September 2007 on Better regulation in the European Union<sup>7</sup>, again regretted that the Commission had withdrawn the proposal for a regulation on the Statute for a European mutual society despite the fact that it is one of the key elements of the Lisbon Strategy, and therefore called on the Commission to adopt an initiative before the end of 2007 to enable a Statute for a European mutual society to be drafted.
- 3 In its Resolution of 4 July 2006 on Further consolidation in the financial services industry<sup>8</sup>, the European Parliament further stated that the diversity of financial institutions, which better reflects the variety of financing needs of corporate entities, SMEs and consumers, should be preserved and that, therefore, EC legislation should not favour any single type of business model or corporate structure or any single type of product over another.

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<sup>3</sup> (2005/2214/INI) - P6\_TA(2006)0206

<sup>4</sup> (2006/2051/INI) - P6\_TA(2006)0295

<sup>5</sup> 2005/2248(INI) - P6\_TA(2006)0340

<sup>6</sup> P6\_TA-PROV(2006)0565

<sup>7</sup> 2007/2095(INI) - P6\_TA-PROV(2007)0363

<sup>8</sup> P6\_TA(2006)0294

- 4 The Commission stated in its 2003 Communication on European company law “The Commission intends to actively support the ongoing legislative process engaged on these statutes (statutes for a European association and a European mutual society), in response to the explicit desire expressed by the European Parliament for giving significant attention to the development of new European legal forms of enterprises”<sup>9</sup> and in 2006 in its summary report on the public consultation on the future of the Company Law and Corporate Governance Action Plan “all representatives of cooperatives and mutual societies invited the Commission to take account of all types of entrepreneurship and called for the adoption of specific statutes.”<sup>10</sup>
- 5 The Commission adopted on 10 July 2007 a proposal for a Directive laying down new solvency requirements for insurance undertakings (“Solvency II”).
- 6 The present Regulation lays down a single statute applicable to the European mutual society (EMS) in order, inter alia, to remove all barriers to cross-border cooperation of mutual societies while taking account of their specific features.
- 7 This Regulation aims to introduce a new legal form in addition to the national forms of mutual societies; therefore the European mutual society must be considered to be a European legal form for mutual societies which has specific EU character. This Regulation leaves unchanged the different national laws already in existence, cannot be regarded as aiming to approximate the laws of the Member States applicable to mutual societies, but has as its purpose the creation of a new form of mutual society in addition to the national forms.
- 8 The completion of the Internal Market, and the improvement it brings about in the economic and social situation throughout the Community mean not only that barriers to trade should be removed, but also that the structures of production should be adapted to the Community dimension. For that purpose, it is essential that all types of corporate structures whose activities are not limited to satisfying purely local needs should be able to plan and carry out the reorganisation of their business on a Community scale.
- 9 The Lisbon strategy as adopted in March 2000 by the EU Heads of States and Governments underlines the renewed focus on growth, innovation and employment and encourages the strengthening of social cohesion and the mobilisation of national and EU resources in the Strategy's economic, social and environmental dimensions.  
  
Mutual societies contribute to the implementation of the Lisbon strategy at national level in these areas and should be given the opportunity; hence the legal tools, to contribute to these objectives as full and valid economic actors at European level.
- 10 The legal framework within which activities should be carried out in the EU is still based largely on national laws and therefore does not correspond to the economic framework within which it should develop if the objectives set out in Article 14 of the Treaty are to be achieved. That situation forms a considerable obstacle to the creation of groups of corporate structures from different Member States.
- 11 The Council has adopted Regulation (EEC) 2137/85 establishing the European Economic Interest Grouping (EEIG), Regulation (EC) 2157/2001 establishing the legal form of the European Company (SE) according to the general principles of the public limited-liability company and Regulation (EC) 1435/2003 establishing the legal form of the European Cooperative Society (ECS). These are not instruments which are suited to the specific features of mutual societies, and therefore a specific statute is needed so as to avoid further discrimination and to guarantee a competitive level playing field.

<sup>9</sup> COMMUNICATION FROM THE COMMISSION TO THE COUNCIL AND THE EUROPEAN PARLIAMENT  
Modernising Company Law and Enhancing Corporate Governance in the European Union – COM(2003)284, p.22

<sup>10</sup> Summary report on the consultation on future priorities for the Action Plan on Modernising Company Law and Enhancing Corporate Governance, -  
[http://ec.europa.eu/internal\\_market/company/docs/consultation/final\\_report\\_en.pdf](http://ec.europa.eu/internal_market/company/docs/consultation/final_report_en.pdf).7

- 12 A mutual society has no shareholders but is collectively and indivisibly owned by its members; its aim is therefore not to remunerate shareholders but only to satisfy its members' needs.
- 13 Mutual societies have particular operating rules that are different from those of other economic agents :
- (i) Mutual societies organize services and provisions in the interest of their members with solidarity and in a collectively financed manner.
  - (ii) In return the members pay a contribution or equivalent, the amount of which may be variable. Members cannot exercise any individual right over the assets of the mutual.

In this respect, the member of a mutual is not a shareholder remunerated for its share contribution to the corporate structure, a mutual being therefore different from companies with capital.

- 14 Mutual societies have particular governance and organization principles that are different from those of other economic agents or corporate structures:
- (i) Mutual societies are private law entities; they are essentially a grouping of members, be it natural or legal persons, operating in accordance with their own rules.
  - (ii) They have no share capital but a formation fund.
  - (iii) Mutual societies are groupings governed either directly or indirectly by their members who at the same time benefit from the services provided by the mutual. The members take part in the decision-making process. This is linked to the principle of the primacy of the member which is reflected in the specific rules on membership, resignation and expulsion.
- 15 Cross-border cooperation and consolidation between mutual societies in the EU is currently hampered by legal and administrative difficulties which should be eliminated in a market without frontiers.
- 16 The introduction of a European legal form for mutual societies, based on common principles but taking into account their specific features, should enable them to operate outside their own national borders in all or part of the territory of the EU, to cooperate with other mutual societies or to merge.
- 17 The EU, anxious to ensure equal terms of competition and to contribute to its economic development, should provide mutual societies, which are a form of organization recognized in most Member States, with adequate legal instruments capable of facilitating the development of their cross-border activities.
- 18 The essential aims of this Regulation are:
- to enable the establishment of a European Mutual Society by physical persons resident in different Member States or legal entities established under the laws of different Member States.
  - to make possible the establishment of a European Mutual Society by cross-border merger of two or more existing mutual societies, given the non-applicability of the Cross-border Merger Directive
  - to allow for the creation of a European Mutual Society by conversion or transformation of a national mutual society into the new form without first being wound-up, where that mutual has its registered office and head office within one Member State
  - to allow for the creation of a European mutual group.
- 19 This Regulation does not affect obligatory social security schemes managed in certain Member States by mutual societies, nor the freedom of Member States to decide whether or not and under what conditions to entrust the management of these schemes to mutual societies.
- 20 In view of the specific EU character of a European Mutual Society, the 'place of central management' arrangement adopted by this Regulation in respect of European Mutual Societies is without prejudice to Member States' laws and does not pre-empt the choices to be made for other EU texts on company law.

This Regulation does not cover other areas of law such as rules on employee involvement in the decision-making process, employment law, taxation law, competition law, intellectual or industrial property law or rules on insolvency and suspension of payments. The provisions of the Member States' law and of EU law are therefore applicable in the above areas and in other areas not covered by this Regulation.

- 21 The rules on the involvement of employees in the European mutual society are laid down in Directive TBD, and those Provisions thus form an indissociable complement to this Regulation and are to be applied concomitantly.
- 22 Provisions adopted by the Member State where the European Mutual Society has its registered office for the purpose of implementing directives on companies may be referred to by analogy for the European Mutual Society in areas where the functioning of the mutual does not require uniform EU rules, such provisions being appropriate to the arrangements governing the European Mutual Society, especially:
- first Council Directive 68/151/EEC of 9 March 1968 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 48 of the Treaty, with a view to making such safeguards equivalent throughout the EU ,
  - fourth Council Directive 78/660/EEC of 25 July 1978 on the annual accounts of certain types of companies
  - seventh Council Directive 83/349/EEC of 13 June 1983 on consolidated accounts
  - eighth Council Directive 84/253/EEC of 10 April 1984 on the approval of persons responsible for carrying out the statutory audits of accounting documents
  - 11th Council Directive 89/666/EEC of 21 December 1989 concerning disclosure requirements in respect of branches opened in a Member State by certain types of company governed by the law of another State.
- 23 Activities in the field of financial services in particular insofar as they concern credit institutions and insurance undertakings have been the subject of legislative measures pursuant to the following Directives:
- Council Directive 86/635/EEC of 8 December 1986 on the annual accounts and consolidated accounts of banks and other financial institutions,
  - Council Directive 92/49/EEC on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance (third non-life insurance Directive),
  - ...
- 24 This form of organization should be optional and independent of the activity the society engages in,

HAS ADOPTED THIS REGULATION:

## I. General Provisions

### Article 1 – Definitions

For the purposes of this Regulation, the following definitions will apply:

“European mutual society (thereafter “EMS)” shall mean a legal person which organises solidarily financed goods and services in the interest of its members.

“Members” shall mean: natural or legal persons who benefit from goods and services of the EMS.

“Statutes” shall mean both the instrument of incorporation of the EMS and, when they are the subject of a separate document, the statutes of the EMS

“EMGS” shall mean European Mutual Group Society. The EMGS is a mutual group formed by legal persons.

## **Article 2 – Scope of application**

This Regulation applies to all European Mutual Societies (EMS), whatever the field of activity as defined by the Members.

## **Article 3 – Nature of EMS**

An EMS is a private legal person without share capital. An EMS shall be a limited-liability legal person: it shall operate with a formation fund and reserves which are indivisible and which shall serve to cover its debts. The EMS is managed democratically and financed collectively for its members.

Mutual societies may be formed throughout the EU under the conditions and in the manner laid down in this Regulation under the name "EMS".

## **Article 4 – Object of EMS**

An EMS shall have as its principal object the satisfaction of its members' needs as defined by its members and not to make profit to remunerate shareholders, in return for a contribution or equivalent, the amount of which could be variable. The means of the EMS shall be used in order to accomplish its mission and in the interest of the members' needs.

The EMS may have as object to coordinate and/or to create financial links, such as financial solidarity, instead of capital links based on contractual agreements. In that case an EMS which is formed by two or more national mutual societies and their subsidiaries shall be called "EMGS".

## **Article 5 – Members of EMS**

Membership is open for all under the conditions defined by the EMS, without discrimination.

## **Article 6 – Applicable law**

An EMS shall be governed:

1.
  - (a) by the provisions of this Regulation,
  - (b) where expressly authorised by this Regulation, by the provisions in the statutes of the EMS,
  - (c) for matters not dealt with by this Regulation or, where a matter is dealt with only partially, for the aspects not covered by this Regulation :
    - by the legal provisions adopted by the Member States in application of EU measures dealing specifically with EMSs;
    - by the legal provisions in Member States which would apply to mutual societies constituted in conformity with the legislation of the Member State in which the EMS has its registered office;
    - by the provisions of statutes in accordance with the legislation of the Member State in which the EMS has its registered office.
2. If national law provides for specific rules and/or restrictions related to the nature of the business carried out by an EMS, or for forms of control by a supervisory authority, that law shall apply in full to the EMS.

## **Article 7 – Principle of non-discrimination**

Subject to this Regulation, a EMS shall be treated in every Member State as if it were a mutual society formed in accordance with the law of the Member State in which it has its registered office.

## II. Acquisition and loss of membership

### Article 8 – Acquisition of membership

The acquisition of membership to an EMS and the means of acquisition of this quality are provided by the statutes of the EMS unless provided otherwise by the legislation of the Member State applicable to mutual societies in which the EMS has its registered office.

The acquisition of membership shall be subject to the approval of the General Meeting or relevant administrative organ, or any other person or organ duly delegated. The refusal decisions may be subject to appeal through the claim proceedings set up in the EMS.

Members of the legal organs that constitute the EMS shall be deemed to be themselves members of the EMS if provided by the statutes.

Membership of an EMS can encompass both natural and legal persons if provided by the statutes.

### Article 9 – Loss of membership

1. Membership as legal and natural persons shall be lost:

- Upon resignation,
- Upon exclusion, where the member commits a serious breach of his/her statutory or contractual obligations or acts contrary to the interests of the EMS,
- Where authorised by the statutes, upon the disappearing of the object binding the member to the EMS,
- In any other situation provided for in the statutes or in the legislation on mutual societies of the Member State in which the EMS has its registered office.

2. Membership as legal persons shall be lost:

- Upon winding-up in the case of a member that is not a natural person,
- Upon bankruptcy,

3. Membership of a natural person shall also be lost upon death.

4. The member shall be excluded by decision of the General Meeting or relevant administrative organ, or any other person or organ duly delegated. It may appeal against such a decision through the claim proceedings set up in the EMS.

### Article 10 – Rights and duties of Members EMS

- Membership entitles to benefit from the goods and/or services carried out by the EMS, and to participate to the EMS organisation under the conditions provided for in articles 26 and 27 [of this Regulation]. Subject to the provisions of article 37, membership does not give any individual right upon the EMS assets
- Where provided for in the statutes, membership shall have the following consequences :
  - If the contribution or equivalent paid within the year is not sufficient to ensure the economic balance of the EMS operations, the management or other relevant organ in accordance with the statutes may decide to issue supplementary calls if it is permitted by the law governing the mutual societies of the Member State where the EMS has its registered office.
  - If the accounts of the financial year show a surplus after deductions for reserves and provisions, the statutes may provide for the sharing of the surplus between the members under the conditions provided in article 31 of this Regulation.
- In the case of the EMS formed as a European Mutual Groups Society, the right and duties of the members are laid down in the affiliation contract and the statutes of the EMGS.

### III. Formation of an EMS

#### Article 11 – Formation

1. An EMS may be formed by either of the following ways:
  - a. by at least two mutual societies, including or not their subsidiaries as defined in art 1 and 2 of directive (83/349/EEC) which fall within the law of at least two different Member States;
  - b. by the conversion of a mutual society, including or not their subsidiaries as defined in art 1 and 2 of directive (83/349/EEC) which is formed under the law of a Member State and has its registered office and head office within the European Union, provided it has at least 500 members in at least two Member States, or it has, directly or indirectly, an effective and actual activity in another Member State, or it can prove that its conversion will allow it to satisfy these conditions ;
  - c. by merger of mutual societies, including or not their subsidiaries as defined in art 1 and 2 of directive (83/349/EEC) formed under the law of a Member State, and which has its registered office and head office within the European Union, if at least two of them fall within the law of two different Member States ;
  - d. by merger of at least one mutual society, including or not their subsidiaries as defined in art 1 and 2 of directive (83/349/EEC) formed under the law of a Member State, with another legal entity subject to private law provided that the absorbing legal entity is the mutual society which has its registered office and head office within the European Union, and that at least two of them fall within the law of two different Member States
  - e. by 5 or more natural persons resident in at least two Member States unless provided otherwise by the legislation of the Member State applicable to mutual societies in which the EMS has its registered office

#### Article 12 – Law applicable during formation

1. Subject to this Regulation, the formation of an EMS shall be governed by the law applicable to mutual societies having the same or similar purpose in the Member State in which the EMS establishes its registered office.
2. The registration of the EMS shall be made public in accordance with Article 23 and 24 of this Regulation.

#### Article 13 – Statutes of the EMS

1. The Statutes of the EMS shall at least include:
  - the name of the EMS, preceded or followed by the abbreviation 'EMS', completed by the nature of its activity,
  - a precise statement of the objects of the EMS;
  - the names of the natural persons and the names of the legal persons which are founding members of the EMS, with an indication of their objects and registered offices in the latter case ;
  - the address of the EMS's registered office;
  - the conditions and procedures for the admission, expulsion and resignation of members;
  - the rights and obligations of members and of the EMS
  - the conditions under which non-members shall benefit from the activity of the EMS when the law of the Member State in which it has its registered office allows so.
  - the subscriptions payable and, where appropriate, the supplementary calls or return on surpluses.
  - the governing structure;
  - the powers and responsibilities of each of the governing organs;
  - provisions governing the appointment and removal of members of these organs;
  - the majority and quorum requirements including the maximum number of proxies unless already included in the relevant sections of the EMS;

- a definition of the governing organs, or members of those organs, having authority to represent the EMS vis-à-vis third parties;
  - the conditions for the initiation of proceedings on behalf of the EMS under Article xx ;
  - the duration of the existence of the mutual society, where this is of limited duration;
  - the statutory grounds for winding-up.
2. For the purposes of this Regulation the statutes of the EMS comprise both the instrument of incorporation and, where they are set out in a separate document, the EMS's statutes themselves.

#### **Article 14 – Formation Fund**

1. The formation fund of an EMS shall be no less than EUR 10,000 or the equivalent in national currency.
2. Where the law of a Member State requires a higher amount for certain types of activity, the same requirement shall apply to EMS which have their registered office in that Member State.

#### **Article 15 – Registered office**

The registered office and the head office of an EMS shall be situated in the same Member State.

#### **Article 16 – Transfer of registered office**

1. The registered office of an EMS may be transferred to another Member State in accordance with paragraphs 2 to 15 of this Article. Such transfer shall not result in the winding-up of the EMS or in the creation of a new legal person.
2. The management or administrative organ shall draw up a transfer proposal and publish it in accordance with Article 23 and 24, without prejudice to any additional forms of publication provided for by the Member State of the registered office. That proposal shall state the current name, the registered office and registration number of the EMS and shall cover:
  - (a) the proposed registered office of the EMS ;
  - (b) the proposed statutes of the EMS including, where appropriate, its new name ;
  - (c) the proposed timetable for the transfer ;
  - (d) any implication the transfer may have on employees' involvement ;
  - (e) any rights provided for the protection of members, creditors and holders of other rights
  - (f) a report established by the management or administrative organ explaining the legal and economic aspects that could result from the transfer on the employees participation in the EMS, as well as for the members of the EMS, the creditors and holders of other rights.
  - (g) any rights provided for the protection of the members, the creditors and the holders of other rights.
3. The EMS's members and creditors and the holders of other rights, and any other body which according to national law can exercise this right, shall be entitled, at least one month before the general meeting called upon to decide on the transfer, to examine, at the EMS's registered office, the transfer proposal and the report drawn up pursuant to paragraph 2 and, on request, to obtain copies of these documents free of charge.
4. Any member or delegate who opposed the transfer decision at the general meeting or at a sectorial or section meeting may tender his/her resignation within two months of the general meeting's decision. Membership shall terminate at the end of the financial year in which the resignation was tendered; the transfer shall not take effect in respect of that member.
5. No decision to transfer may be taken for two months after publication of the proposal. Such a decision shall be taken as laid down in Article 26.9,2.2°.
6. Before the competent authority issues the certificate mentioned in paragraph 7, the EMS shall satisfy it that, in respect of any liabilities arising prior to the publication of the transfer proposal, the interests of creditors and holders of other rights in respect of the EMS (including those of public organs) have been adequately protected in accordance with requirements laid down by the Member State where the EMS has its registered office prior to the transfer.  
A Member State may extend the application of the first sub-paragraph to liabilities that arise, or may arise, prior to the transfer.

The first and second sub-paragraphs shall apply without prejudice to the application of the national legislation of Member States concerning the satisfaction or securing of payments to public organs.

7. In the Member State in which the EMS has its registered office, the court, notary or other competent authority shall issue a certificate attesting to the completion of the acts and formalities to be accomplished before the transfer.

8. The new registration cannot be made before the certificate referred to in paragraph 7 has been submitted and evidence has been produced that the formalities required for registration in the country of the new registered office have been completed.

9. The transfer of an EMS's registered office and the consequent amendment of its statutes shall take effect on the date on which the EMS is registered in accordance with Article 22 in the register for its new registered office.

10. When the EMS's new registration has been effected, the registry for its new registration shall notify the register for its old registration. Deletion of the old registration shall be effected on receipt of that notification.

11. The new registration and the deletion of the old registration shall be publicised in the Member States concerned, in accordance with Article 23.

12. On publication of an EMS's new registration, the new registered office may be relied on as against third parties. However, as long as the deletion of the EMS's registration from the register of its previous registered office has not been publicised, third parties may continue to rely on the previous registered office unless the EMS proves that such third parties were aware of the new registered office.

13. The laws of a Member State may provide that, as regards MEs registered in that Member State, the transfer of a registered office which would result in a change of the law applicable shall not take effect if any of that Member State's competent authorities opposes it within the two-month period referred to in paragraph 5. Such opposition may be based only on grounds of public interest.

Where an EMS is supervised by a national financial supervisory authority according to EU legislation, the right to oppose the change of registered office applies to this authority as well. Review by a judicial authority shall be possible.

14. An EMS may not transfer its registered office if proceedings for winding-up, including voluntary winding-up, liquidation, insolvency or suspension of payments or other similar proceedings have been brought against it.

15. An EMS which has transferred its registered office to another Member State shall be considered, in respect of any course of action arising prior to the transfer as determined in paragraph 10, as having its registered office in the Member State where the EMS was registered prior to the transfer, even if the EMS is sued after the transfer.

## **Article 17 – Form of the EMS**

An EMS shall have legal personality. It shall acquire it on the day of its registration in the Member State in which it has its registered office, in the register designated by that Member State in accordance with Article 22.

If steps have been taken in an EMS's name before its acquisition of legal personality, and the EMS does not assume the obligations arising from those steps, the persons who took them shall be jointly and severally and indefinitely liable thereof, unless otherwise agreed.

## **Formation by conversion**

### **Article 18 – Constitution of an EMS by way of a transformation of an existing mutual society**

These conversion shall not result in the winding-up or in the creation of a new legal person”:

1. Without prejudice to Article 22, the conversion of a mutual society into an EMS shall not result in the winding-up of the mutual society or in the creation of a new legal person.

2. The registered office may not be transferred from one Member State to another pursuant to Article 16 at the same time as the conversion is effected.

3. The administrative or management organ of the mutual society in question shall draw up draft terms of conversion and a report explaining and justifying the legal and economic aspects as well as the

employment effects of the conversion and indicating the implications for members and employees of the adoption of the form of an EMS.

4. The draft terms of conversion shall be made public in the manner laid down in each Member State's law at least one month before the general meeting called upon to decide thereon.

5. The general meeting of the mutual society in question shall approve the draft terms of conversion together with the statutes of the EMS.

6. Member States may make a conversion conditional on a favourable vote of a qualified majority or unanimity in the controlling body of the mutual society to be converted within which employee participation is organised.

7. The rights and obligations of the mutual society to be converted on both individual and collective terms and conditions of employment arising from national law, practice and individual employment contracts or employment relationships and existing at the date of the registration shall, by reason of such registration, be transferred to the EMS.

## Formation by merger

### Article 19 – General

#### a) Formation by merger:

An EMS may be formed by means of a merger carried out in accordance with:

- the procedure for merger by acquisition,
- the procedure for merger by the formation of a new legal person.

In the case of a merger by acquisition, the acquiring mutual society shall take the form of an EMS when the merger takes place. In the case of a merger by the formation of a new legal person, the latter shall take the form of an EMS.

#### b) Law applicable in the case of merger

For matters not covered by this section or, where a matter is partly covered by it, for aspects not covered by it, each mutual society involved in the formation of an EMS by merger shall be governed by the provisions of the law of the Member State where it is registered applying to mergers of mutual societies and, failing that, the provisions applicable to internal mergers of mutual societies under the law of that Member State.

#### c) Grounds for opposition to a merger

The laws of a Member State may provide that a mutual society governed by the law of that Member State may not take part in the formation of an EMS by merger if any of that Member State's competent authorities opposes it before the issue of the certificate referred to in Article 19 (k, 2<sup>nd</sup>).

Such opposition may be based only on grounds of public interest. Review by a judicial authority shall be possible.

#### d) Conditions of a merger

1. The management or relevant administrative organ of merging mutual societies shall draw up draft terms of merger. Such draft shall include the following particulars:

- i) the name and registered office of each of the merging mutual societies together with those proposed for the EMS
- ii) the date from which the transactions of the merging mutual societies will be treated for accounting purposes as being those of the EMS;
- iii) the special conditions or advantages attached to debentures or securities other than shares which do not confer the status of member;
- iv) the forms of protection of the rights of members and creditors of the merging mutual societies;
- v) any special advantage granted to the experts who examine the draft terms of merger or to members of the administrative, management, supervisory or controlling organorganss of the merging mutual societies;
- vi) the statutes of the EMS;
- vi) information on the procedures arranging arrangements for employee involvement.

2. The merging mutual societies may include further items in the draft terms of merger.

#### e) Explanation and justification of the terms of merger

The administrative or management of each merging mutual societies shall draw up a detailed written report explaining and justifying the draft terms of merger from a legal and economic viewpoint. The report shall also indicate any difficulty relating to special valuation of assets and liabilities transferred to the EMS.

**f) Disclosure and publication requirements**

1. The law applicable to mutual societies concerning the disclosure requirements of the draft terms of mergers shall apply to each of the merging mutual societies, subject to the additional requirements imposed by any of Member State where one of the merging mutual societies is registered.

2. Disclosure of the draft terms of merger in the national Official Journal shall at least include the following particulars for each of the merging mutual societies:

- i) the type, name and registered office of each merging mutual society;
- ii) the address of the place or of the register in which the statutes and all other documents and particulars are filed in respect of each merging mutual society, and the number of the entry in that register;
- iii) the arrangements made in accordance with Articles 19, j for the exercise of the rights of the members and creditors of the mutual society and the address at which complete information on those arrangements may be obtained free of charge;
- vi) the name and registered office proposed for the EMS;
- vii) the conditions determining the date on which the merger will enter into force pursuant to Article 19,m

**g) Right to information**

Any member shall be entitled, at least one month before the date of the general meeting required to decide on the merger, to review the following documents at the mutual society's registered office:

- i) the draft terms of merger mentioned in Article 19, d;
- ii) the annual accounts and management reports of the merging mutual societies for the three preceding financial years;
- iii) an accounting statement drafted in accordance with the provisions applicable to the internal mergers of mutual societies where such a statement is required by these provisions.

**h) Independent experts' report**

1. Each merging mutual society will appoint one or more independent experts, who will examine the draft terms of merger and draw up a written report for the members.

2. A single report for all merging mutual societies may be drawn up where this is permitted by the laws of the Member States to which the mutual societies are subject.

3. The rights and obligations of independent experts in relation to mergers of mutual societies shall be determined by the law of the Member State concerning the appointment of independent experts.

4. Members of the EMS may consult the independent experts' report at the EMS registered office.

**i) Approval of the terms of merger**

1. The general meeting of each of the merging mutual societies shall approve the draft terms of the merger.

2. Employee involvement in the EMS shall be decided upon pursuant to Directive xyz.

**j) Laws applicable to formation by merger**

1. The law of the Member State governing each merging mutual society shall apply to the protection of the interests of:

- creditors of the merging mutual societies,
- holders of debentures and securities in the merging mutual societies.

2. A Member State may, in the case of merging mutual societies governed by its law, adopt provisions designed to ensure appropriate protection for members who have opposed the merger.

**k) Scrutiny of merger procedure**

1. The legality of a merger shall be scrutinised, as regards the part of the procedure concerning each merging mutual society, in accordance with the law of the Member State to which the merging mutual society is subject.

2. In each Member State concerned, the court, notary or other competent authority shall issue a certificate attesting to the completion of the pre-merger acts and formalities.

**l) Scrutiny of legality of merger**

The legality of a merger shall be scrutinised, as regards the part of the procedure concerning the completion of the merger and the formation of the EMS, by the court, notary or other competent authority in the Member State of the proposed registered office of the EMS.

To that end, each merging mutual society shall submit to the competent authority the certificate referred to in Article 19, k within six months of its issue together with a copy of the draft terms of merger approved by that mutual society.

**m) Registration of merger**

1. A merger and the simultaneous formation of an EMS shall enter into force on the date on which the EMS is registered in accordance with Article 22.

2. The EMS may not be registered until all the formalities provided for in Articles 19, k and 19, l have been completed.

**n) Disclosure of merger**

For each of the merging mutual societies the completion of the merger shall be disclosed as laid down by the law of the Member State concerned in accordance with the relevant national laws .

**o) Consequences of merger**

1. A merger carried out as laid down in the first indent of Article 19, a shall have the following consequences *ipso jure* and simultaneously:

(a) all the assets and liabilities of the merging mutual societies are transferred to the EMS;

(b) the members of the merging mutual societies become members of the EMS;

(c) the merging mutual societies cease to exist.

(d) Where, in the case of a merger of mutual societies, the law of a Member State requires the completion of any special formalities before the transfer of certain assets, rights and obligations by the merging mutual societies becomes effective against third parties, those formalities shall apply and shall be carried out either by the merging mutual societies or by the EMS following its registration.

The rights and obligations of the participating mutual societies in relation to both individual and collective terms and conditions of employment arising from national law, practice and individual employment contracts or employment relationships and existing at the date of the registration shall, by reason of such registration be transferred to the EMS.

2. When the merger has been registered, the EMS shall immediately inform the members of the mutual society being acquired of the fact that they have been entered in the register of members.

**p) Legality of the merger**

1. A merger as provided for in Article 11, c and d may not be declared null and void once the EMS has been registered.

2. The absence of scrutiny of the legality of the merger pursuant to Articles 19, k and l shall constitute one of the grounds for the winding-up of the EMS, in accordance with the provisions of Article 35.

**Article 20 – Constitution of an EMGS**

The acquisition of membership in an EMGS is done via the signing of an agreement which regulates the rights and obligations of the EMGS and its members. This agreement is an addition to the statutes of the EMGS.

This agreement, its modification and resignation thereof must be approved by the General Meeting of the EMGS and its members.

**Article 21 – Particulars to be stated in the EMS' documents**

1. Letters and documents sent to third parties shall state legibly :

(a) the name of the EMS, preceded or followed by the abbreviation 'EMS' (and a reference to the national legislation to which it is subject) and the fact that it is a limited-liability legal person ;

(b) the place of the register in which the EMS is registered in accordance with Article 22, and the number of the EMS's entry in that register;

(c) the address of the EMS's registered office;

(d) the fact that the EMS is in liquidation or under the administration of the courts if that is so.

2. Only EMSs may include the acronym 'EMS' before or after their registered name in order to indicate their legal form. Nevertheless, companies, firms and other legal persons registered in a Member State before the date of entry into force of this Regulation in the names of which the acronym 'EMS' appears shall not be required to alter their names.

## IV. Registration of an EMS and disclosure

### Article 22 – Registration and disclosure requirements

1. Every EMS shall be registered in the Member State in which it has its registered office in a register designated by the law of that Member State.
2. A EMS may not be registered unless an agreement on arrangements for employee involvement pursuant to Article x of Directive 200//EC has been concluded, or a decision pursuant to Article x of the Directive has been taken, or the period for negotiations pursuant to Article x of the Directive has expired without an agreement having been concluded.
3. Member States shall take the measures required to ensure that the following documents and particulars are disclosed as provided for in paragraph 1:
  - (a) the statutes of the EMS, any amendments to them, and the complete text of the statutes in its up-to-date form;
  - (b) the opening or closing of any establishment;
  - (c) the appointment, termination of office and particulars of the persons who either as a governing organ constituted pursuant to law or as members of any such governing organ:
    - are authorised to represent the EMS, either individually or collectively, in dealings with third parties and in legal proceedings,
    - take part in the administration, supervision or control of the EMS;
  - (d) at least once a year, the amount of the formation fund or equivalent;
  - (e) the balance sheet and the surplus and loss account for each financial year. The document containing the balance sheet shall give particulars of the persons who are required by law to certify it;
  - (f) any proposal to transfer the registered office as referred to in Article 16 ;
  - (g) the winding-up and liquidation of the EMS;
  - (h) any declaration of nullity of the EMS by a court;
  - (i) the appointment of liquidators, particulars of such liquidators, and their respective powers, the termination of their office;
  - (j) the conclusion of the liquidation of the EMS and the removal of the EMS from the register.
4. Member States shall also ensure that anyone may consult the documents referred to in Article 22 (3) in the register referred to in Article 22 (1), and may obtain a copy of the whole or any part, by post if requested.

### Article 23 – Publication of documents and particulars relating to the EMS in the Member States

1. Publication of documents and particulars concerning a EMS which must be made public under this Regulation shall be effected in the manner laid down in the laws of the Member State applicable to mutual societies in line with Article 6.
2. The national rules adopted pursuant to Directive 89/ 666/EEC shall apply to branches of a EMS opened in a Member State other than that in which it has its registered office. However, Member States may provide for derogations from the national provisions implementing that Directive to take account of the specific features of mutual societies.
3. Documents and particulars may be relied on by the EMS as against third parties only after they have been disclosed in accordance with paragraph 1, unless the EMS proves that the third party had knowledge thereof. However, they may not be relied on in respect of transactions which take place before the 16th day after publication as against third parties who prove that they could not have had knowledge thereof.
4. Third parties may rely on any documents and particulars in respect of which the disclosure formalities have not yet been completed, save where non-disclosure causes them not to have effect.

## Article 24 – Publication in the Official Journal

1. Notice of a EMS's registration and of the deletion of such a registration shall be published for information purposes in the Official Journal of the European Union after publication in accordance with Article 23. That notice shall state the name, number, date and place of registration of the EMS, the date and place of publication and the title of publication, the registered office of the EMS and its sector of activity.
2. Where the registered office of a EMS is transferred in accordance with Article 16, notice shall be published giving the information provided for in paragraph 1, together with that relating to the new registration.
3. The particulars referred to in paragraph 1 shall be forwarded to the Office for Official Publications of the European Communities within one month of the publication referred to in Article xx .

## V. Organisation and functioning of an EMS

### Article 25 – Structure of organs

Under the conditions laid down by this Regulation an EMS shall comprise:

- (a) a general meeting; and
- (b) either a supervisory organ and a management organ (two-tier system) or an administrative organ (one-tier system) depending on the form adopted in the statutes.

### Article 26 – General meeting

#### Article 26.1 – Competence

The general meeting shall decide on matters for which it is given sole responsibility by:

- (a) this Regulation;
- (b) the legislation of the Member State in which the EMS' registered office is situated, adopted under Directive .../EC (employee participation).

Furthermore, the general meeting shall decide on matters for which responsibility is given to the general meeting of a mutual society governed by the law of the Member State in which the EMS' registered office is situated:

- either by the law of that Member State
- or by the EMS' statutes in accordance with that law

relating to the approval of the annual and/or consolidated accounts, the allocation of results, and the appointment or removal of members of the supervisory organ without prejudice to the application of article 27,2 or administrative organ.

#### Article 26.2 – Holding of general meeting

1. A general meeting shall be held at least once a year, not later than six months after the end of the EMS' financial year. However, a Member State may provide that the first general meeting may be held within the eighteen (18) months from the formation of the EMS.
2. Additional general meetings may be convened at any time by the management organ or the administrative organ. The management organ is bound to convene the general meeting at the request of the supervisory organ.
3. The agenda for the general meeting held after the end of the financial year shall include at least the approval of the annual accounts and of the appropriation of the profit or treatment of the loss and the approval of the annual report referred to in Article 46 of Directive 78/660/EEC, to be submitted by the management or administrative organ.
4. The statutes of an EMS with a management organ and a supervisory organ may provide that a decision on approval of the annual accounts is to be taken jointly by the two organs, in separate

votes, and that the general meeting i.e to pass a resolution only if the organs are unable to reach agreement.

5. A general meeting may during a meeting decide that a further meeting be convened and set the date and the agenda.

### **Article 26.3 – Meeting called by a minority of members**

1. At least 10% of the members of the General Meeting, which proportion may be reduced by the statutes, may request that the General Meeting be convened and its agenda set.

In the case of an EGMS, this request must be made by at least 10% of the voting rights of all members in the General Meeting.

2. The request for a meeting shall give the reasons for convening it and the items to be included on the agenda.

3. If, following a request made under paragraph 1 the necessary steps have not been taken within one month, the court or competent authority within the State where the EMS' registered office is situated may order the convening of a general meeting or authorise either the members who have requested it or their representative to convene the meeting.

### **Article 26.4 – Form and notice of meeting**

1. The general meeting shall be convened either by

- a notice published in the national gazette appointed by the Member State in which the EMS has its registered if provided by the statute of the EMS

- a notice published in one or more newspapers with a large circulation in the Member States if provided by the statute of the EMS,

- a notice in writing sent to every member or delegate of the EMS by any available means if provided by the EMS statutes.

- any electronic, technical mean available if provided by the EMS statutes.

2. The notice calling the general meeting shall at least contain the following information:

- the name and the registered office of the EMS,

- the place and date of the meeting,

- the type of general meeting,

- a statement of the formalities, if any, prescribed by the rules for attendance at the general meeting and for the exercise of the right to vote,

- the agenda, showing the subjects to be discussed and the proposals for resolutions.

3. The period between the date of publication of the notice or the date of dispatch of the communication referred to in paragraph 1 and the date of the opening of the general meeting shall be not less than 15 days.

### **Article 26.5 – Addition of items to the agenda**

10 % or more of the members of the GM of an EMS or in the case of a EMGS 10% of the votes, which proportion may be reduced by the statutes, may, within ten days of receiving the notice convening a general meeting, request the addition of one or more items to the agenda.

The procedures and time limits applicable to such requests shall be laid down by the national law of the Member State in which the EMS' registered office is situated or, failing that, by the EMS' statutes.

### **Article 26.6 – Attendance and proxies**

The general meeting shall be composed either by the members of the EMS and /or by the delegates.

1. Members or delegates shall only be entitled to speak and vote at general meetings on the points that are included in the agenda.

A person entitled to vote shall be entitled to appoint a proxy to represent him at a general meeting in accordance with procedures which must be laid down in the statutes of the EMS. A member or delegate can act as proxy for maximum 1 member or delegate.

2. Unless otherwise stated in art 26.9, 2.1° and 2.2°; the statutes of the EMS may permit postal or electronic voting, in which case they shall lay down the necessary procedures.

#### **Article 26.7 – Right to information**

1. Every member of the General Meeting who so requests before or at a general meeting shall be entitled to obtain information from the management or administrative organ on the EMS' activities arising from items on the agenda. Insofar as possible, information shall be provided (at the latest) at the general meeting in question.
2. The management or administrative organ may refuse to supply such information only where its disclosure:
  - would be likely to be seriously prejudicial to the EMS;
  - would be incompatible with a legal obligation of confidentiality.
3. A member refused information may require that his question and the grounds for refusal be entered in the minutes of the general meeting.
4. At least ten days before the general meeting that follows the end of the financial year, members may examine any accounting documents that must be drawn up in accordance with Article [ ].

#### **Article 26.8 – Voting rights**

1. Each member (natural or legal person) or delegate of the General Meeting shall have one vote.
2. The statutes may, however, give more than one vote, either to a member who is a legal person on the basis of the number of his activities and of the number of its members or to a member who is a natural person on the basis of the extent of his participation in the activities of the mutual society; in these cases the statutes of the EMS shall provide that none of such members shall hold a majority of the votes. This latter provision shall not apply to the EMGS.

#### **Article 26.9 – Quorum and voting modalities**

1. General meeting decisions relating to the approval of the annual and/or consolidated accounts, the allocation of results, and the appointment or removal of members of the supervisory organ, without prejudice to the application of article 27,2, are validly taken by an absolute majority of the votes cast by the members or delegates present or represented including postal or electronic voting, if provided by the statutes of the EMS and if at least a quarter of them are present.
2. General meeting decisions relating to
  - 1° the amendment of the statutes are validly taken by if at least one third of the members or delegates making the general meeting are present or represented, excluding by postal or electronic voting.
  - 2° the merger, winding-up, liquidation, change of form, transfer of the registered office in another Member State or third country, transfer of the EMS main activity or portfolio are validly taken if at least two thirds of the members or delegates making the general meeting are present or represented, excluding by postal or electronic voting.
3. Decisions of the general meeting referring to Article 26.9., 2.1° and 2.2° shall be taken by a qualified majority of 90 % of the votes cast by the members or delegates present or represented.
4. The calculation of votes cast shall not include abstentions or spoilt or blank votes.

## **Article 26.10 – Minutes**

1. Minutes shall be drawn up for every general meeting. The minutes shall include the following information:
  - the venue and date of the meeting;
  - the decisions taken;
  - the results of votings.
2. The attendance list, the documents relating to the convening of the general meeting and the reports submitted to the members on the items on the agenda shall be annexed to the minutes.
3. The minutes and the documents annexed thereto shall be preserved for at least five years. A copy of the minutes and the documents annexed thereto may be obtained by any member upon request against payment of the administrative cost.
4. The minutes shall be signed by the chairman of the meeting.

## **Article 27 – Management, Supervisory and Administrative Organs**

### **Article 27.1 – Structure**

Under the conditions laid down by this Regulation the statutes of an EMS shall determine that an EMS's structure shall be either two-tier (management organ and supervisory organ) or one-tier (administrative organ);

### **Article 27.2 : Two-tier system Subsection 1: Management organ**

#### **Article 27.2.1 – Functions of the management organ; appointment of members**

1. The management organ shall manage the EMS. The member or members of the management organ shall have the power to bind the EMS in dealings with third parties and to represent it in legal proceedings in accordance with the provisions adopted pursuant to Directive 68/151/EEC and 2003/58/EC by the Member State in which the EMS's registered office is situated.
2. The member or members of the management organ shall be appointed and removed by the supervisory organ. However, a Member State may require or permit the statutes to provide that the member or members of the management organ shall be appointed by the general meeting.
3. No person may at the same time be a member of the management organ and of the supervisory organ. In the event of a vacancy, the supervisory organ may, however, nominate one of its members to perform the duties of a member of the management organ - until the next General Meeting. During such a period the duties of the person concerned as a member of the supervisory organ shall be suspended.
4. The number of members of the management organ shall be laid down in the statutes of the EMS.
5. Where no provision is made for a two-tier system in relation to mutual societies with registered offices within its territory, a Member State shall adopt the appropriate measures in relation to the EMS

#### **Article 27.2.2 – Chairmanship; convening of meeting**

1. The management organ shall elect a chairman from among its members, in accordance with the statutes.
2. Meetings of the management organ shall be convened in accordance with the statutes. In any event any member of the management organ may call a meeting where urgency requires, stating his reasons.

## **Article 27.3 : Two-tier system Subsection 2: Supervisory Organ**

### **Article 27.3.1 – Functions of the Supervisory organ; appointment of members**

1. The supervisory organ shall supervise the duties performed by the management organ. It may not itself exercise the power to manage the EMS. The supervisory organ may not represent the EMS in dealings with third parties. It shall represent the EMS in respect of litigation or a social action based on the civil liability of one or more members of the management organ vis-à-vis the EMS for errors committed in the performance of their duties or the conclusion of contracts to which the EMS is party and in which one of the members of the management organ has an interest, if only indirect.
2. With the exception of the election and removal of the employees' representatives in accordance with the national provisions adopted pursuant to Directive (.../EC) in connection with the role of the employees, the members of the supervisory organ shall be appointed and removed by the general meeting.  
However, the members of the first supervisory organ may be appointed in the statutes.
3. The number of members of the supervisory organ shall be laid down in the statutes.

### **Article 27.3.2 – Right to information**

1. The management organ shall report to the supervisory organ at least once every three months on the progress and foreseeable developments of the EMS's affairs, taking particular account of any information relating to undertakings controlled by the EMS that may significantly affect those affairs.
2. The management organ shall communicate to the supervisory organ without delay any information which may have an appreciable effect on the EMS.
3. The supervisory organ may at any time require the management organ to provide information or a special report on any matter concerning the EMS which is necessary for the performance of its duties.
4. The supervisory organ may undertake all investigations necessary for the performance of its duties. It may appoint one or more of its members to carry out this task and may call in the help of experts.
5. Each member of the supervisory organ shall be entitled to examine all information communicated by the management organ to the supervisory organ.

### **Article 27.3.3 – Chairmanship, calling of meetings**

1. The supervisory organ shall elect a chairman from among its members.
2. The chairman shall call a meeting of the supervisory organ under the conditions laid down in the statutes, either on his own initiative, or at the request of at least one third of the members of the supervisory organ, or at the request of the management organ. The request must indicate the reasons for calling the meeting. If no action has been taken in respect of such a request within fifteen days the meeting of the supervisory organ may be called by those who made the request.

## **Article 27.4 : The one-tier system**

### **Article 27.4.1 – Functions of the administrative organ; appointment of members**

1. The administrative organ shall direct the EMS and define its strategy; in the case of the EMGS this implies in particular to coordinate the strategy of the mutual group and to oversee the application of the rights and obligations as stipulated in the contractual agreement of the group under Article 10. The administrative organ shall have the power to represent the EMS in dealings with third parties and in legal proceedings.

2. The number of members of the administrative organ shall be laid down in the statutes.
3. The administrative organ may delegate to one or more of its members the power to manage and to represent the EMS. The statutes, or if the statutes are silent the general meeting, may lay down the conditions within which such delegation shall operate. On its own responsibility, it may also delegate certain management responsibilities to one or more persons not members of the organ; such management responsibilities may be revoked at any time.
4. With the exception of the employees' representatives pursuant to the national provisions adopted in accordance with Directive .../.../EC in respect of the role of the workers, the member or members of the administrative organ shall be appointed and removed by the general meeting.
5. Where no provision is made for a one-tier system in relation to mutual societies with registered offices within its territory, a Member State shall adopt the appropriate measures in relation to the EMS.

#### **Article 27.4.2 – Holding of meetings and right to information**

1. The administrative organ shall meet at least once every three months to discuss the progress and foreseeable prospects of the EMS's affairs.
2. The administrative organ shall meet to deliberate on the operations referred to in Article 27.5.5.
3. Each member of the administrative organ shall be entitled to examine all reports, documents and information supplied to the latter.

#### **Article 27.4.3 – Chairmanship, calling of meetings**

1. The administrative organ shall appoint a chairman from among its members. However, the legislation of a Member State may stipulate that the statutes of the EMS authorize the general meeting to elect a chairman
2. The Chairman shall call a meeting of the administrative organ under the conditions laid down in the statutes, either on his own initiative or at the request of at least one-third of its members. The request must indicate the reasons for calling the meeting. If the request is not satisfied within fifteen days, the meeting of the administrative organ may be called by those who made the request.

#### **Article 27.5 - Rules common to the two-tier and one-tier systems**

##### **Article 27.5.1 – Term of office**

1. Members of EMS organs shall be appointed or elected for a period laid down in the statutes not exceeding six years.
2. Members of EMS organs may be reappointed or re-elected for the same period as above, one or more times unless otherwise provided by the statutes.

##### **Article 27.5.2 – Conditions of membership in the organs**

1. The statutes of an EMS may permit a legal person to be a member of one of its organs., That legal person shall designate a natural person as its representative to exercise its functions on the EMS organ in question. The representative shall be subject to the same conditions and obligations as if he were personally a member of the EMS organ.
2. No person may be a member of a any organ of an EMS, or a representative of a member within the meaning of par 1, who is disqualified under the law of the Member State in which the EMS has its registered office from serving on the corresponding organ of any society governed by the law of the Member State or as a result of a judicial or administrative decision delivered or recognized in a Member State.

3. The statutes of a EMS may, in accordance with the law applicable to mutual societies in the Member States in which the EMS has its registered office, lay down special conditions of eligibility for members representing the administrative organ

### **Article 27.5.3 – “Internal rules”**

Any governing organ may adopt Internal rules under the conditions provided for by the statutes

### **Article 27.5.4 – Power of Representation and Liability of the EMS**

1. Where the authority to represent the EMS in dealings with third parties, in accordance with Articles 27.2.1 and 27.4.1, is conferred on two or more members, those persons shall exercise that authority collectively.
2. However, the legislation of a Member State may provide that authority to represent the EMS may be conferred by the statutes of an EMS either on one single person or on two or more persons acting jointly or individually.
3. The EMS shall be bound by the EMS' organs acting vis-à-vis third parties, even if those acts are not within the objects of the EMS, unless such acts exceed the powers that the law of the Member State in which the EMS has its registered office confers or allows these powers to be conferred to those organs.  
However, Member States may provide that the EMS shall not be bound where such acts are outside the objects of the EMS (are not within the scope of the EMS purpose), if it proves that the third party knew that the act was outside those objects or could not in view of the circumstances have been unaware of it; disclosure of the statutes shall not of itself be sufficient proof thereof.
4. The limits on the powers of the EMS' organs, arising under the statutes or from a decision of the competent organs, may never be relied on as against third parties, even if they have been disclosed.

### **Article 27.5.5 – Operations requiring authorization**

1. The statutes of the EMS shall set out the categories of operations for which :
  - under the two-tier system, authorization from the supervisory organ or the general meeting must be requested by the management organ before any decision is taken; or
  - under the one-tier system, the administrative organ may not delegate authorization to take a decision to some of its members, so that an express decision from the administrative organ or general meeting is required.
2. However, a Member State may lay down the minimum categories of operations referred to in paragraph 1 which must feature in the statutes of EMS whose registered office is in its territory. Furthermore, a Member State may provide that, under a two-tier system, the supervisory organ may itself determine which categories of operation are to be subject to authorization.

### **Article 27.5.6 – Rights and obligations**

Within the scope of the functions attributed to them by this Regulation, each member of an organ shall have the same rights and obligations. They shall carry out their functions in the interests of the EMS, having regard in particular to the interests of the members. They shall observe confidentiality, even after their resignation or removal, in respect of the confidential information they have been provided with.

### **Article 27.5.7 – Conduct of business**

1. Unless the statutes of an EMS require a higher quorum, an organ shall not conduct business validly unless at least half of its members are present and party to the decisions.
2. Each member of an organ shall have one vote. The statutes may, however, give more than one vote, either to a member who is a legal person on the basis of the number of his activities and of the number of its members or to a member who is a natural person on the basis of the extent of his participation in the activities of the mutual society; in these cases the statutes shall provide that none of such members shall hold a majority of the votes. This latter provision shall not apply to the EMGS.
3. Decisions shall be taken by a majority of the votes of the members present, unless the statutes provide for a larger majority.
4. The chairman of each organ shall have a casting vote in the event of a tie.
5. In the case of an organ which includes employees' representatives, a Member State may provide that the rules governing the supervisory organ's quorum and decision-making majority shall be those applicable to similar domestic legal persons.

### **Article 27.5.8 – Civil liability**

Members of the management, supervisory or administrative organ shall be liable, in accordance with the provisions applicable in the Member State in which the EMS's registered office is situated, for loss or damage sustained by the EMS following any breach on their part of the legal, statutory or other obligations inherent to their duties.

## **VI. Financing, annual accounts, consolidated accounts, auditing and disclosure**

### **Article 28 – Financing**

An EMS may avail itself of all forms of financing under the most favourable conditions applying to mutual societies in the Member State in which it has its registered office. The same applies to the financial means it wishes to obtain in the Member States in which it has its members (including the founding members that are legal persons) or its establishments.

### **Article 29 – Annual accounts and consolidated accounts**

1. For the purpose of drawing up its annual accounts and its consolidated accounts if any, including the annual report accompanying them and their auditing and disclosure, the EMS shall be subject to the measures adopted in the state in which it has its registered office under Directives 78/660/EEC and 83/349/EEC. However, Member States may provide for amendments to the national provisions implementing those Directives to take into account the particular nature of the mutual societies.
2. Where EMS are not subject, under the law of the Member State in which the EMS has its registered office, to a disclosure requirement as provided for in Article 3 of Directive 68/151/EEC followed by 2003/58/EC; the EMS must at least make the accounting documents available to the public at its registered office. Copies of these documents must be obtainable on request. The price charged for these copies must not exceed the administrative cost.
3. The EMS may draw up its annual accounts, and its consolidated accounts if any, in the national currency. An EMS whose registered office is outside the euro area may also express its annual accounts and, where appropriate, consolidated accounts, in euro. In that event, the bases of conversion used to express in euro those items included in the accounts which are or were originally expressed in another currency shall be disclosed in the notes on the accounts.

4. The bylaws of an EMS with a management organ and a supervisory organ may provide that a decision on establishment of the annual accounts is to be taken jointly by the two organs, in separate votes, and that the general meeting is to pass a resolution only if the organs are unable to reach agreement.

#### **Article 30 – Accounts of EMS with financial activities**

1. An EMS which is a credit or financial institution shall be governed by the rules laid down in the national law of the Member State in which its registered office is situated under directives relating to the taking up and pursuit of the business of credit institutions as regards the preparation of its annual and, where appropriate, consolidated accounts, including the accompanying annual report and the auditing and publication of those accounts.
2. An EMS which is an insurance undertaking shall be governed by the rules laid down in the national law of the Member State in which its registered office is situated under directives relating to the annual accounts and the consolidated accounts of insurance undertakings as regards the preparation of its annual and, where appropriate, consolidated accounts including the accompanying annual report and the auditing and publication of those accounts.

#### **Article 31 – Allocation of available surplus**

1. The balance of the surplus after deduction of the allocation to the legal reserve, with the addition of any surpluses carried over and of any sums drawn from the reserves, or deducted of any losses carried over, shall constitute the surplus of the financial year.
2. The general meeting which considers the accounts for the financial year, or the relevant organ in accordance with the statutes, may allocate the surplus in the order and proportions laid down in the statutes, and in particular:
  - carry them forward,
  - appropriate them to any legal or statutory reserve fund,
  - provide a distribution between the members in proportion to their paid-up contributions when allowed by the bylaws of the EMS.

#### **Article 32 – Statutory audit of the accounts**

The annual accounts of the EMS, and its consolidated accounts if any, shall be audited by one or more persons authorised to do so in the Member State in which the EMS has its registered office in accordance with the measures adopted in that State pursuant to Directives 84/253/EEC and 89/48/EEC.

#### **Article 33 – Disclosure of accounts**

- The annual accounts, the consolidated accounts if any, duly approved, and the annual report and audit report shall be disclosed in accordance with the measures adopted by the Member State in which the EMS has its registered office pursuant to Article 3 of Directive 68/151/EEC.
- Where EMS are not subject, under the law of the Member State in which the EMS has its registered office, to a disclosure requirement as provided for in Article 3 of Directive 68/151/EEC, the EMS must at least make the accounting documents or a part thereof available to the public at its registered office, by electronic way or by any other modern way of communication. Copies of these documents must be obtainable on request. The price charged for these copies must not exceed the administrative cost.

## VII. Winding-up, liquidation and conversion

### Article 34 – Winding-up by the general meeting

1. An EMS may be wound up by a decision of the general meeting ordering its winding-up, taken in accordance with the rules laid down in Article 26.9, 2.

However, the general meeting may decide in accordance with the same rules, to reverse the decision to wind up, as long as there has been no distribution on the basis of the liquidation.

2. Moreover, the management or administrative organ must call a general meeting in the following cases to decide either to wind up the EMS or to continue the activities of the EMS in accordance with Article 26.9,2 :

- where the period fixed in the bylaws has expired,
- where the subscribed formation fund has been reduced below the amount laid down in Article 14 of this Regulation,
- where the disclosure of accounts has not taken place in the EMS' last three financial years,
- where the number of members is below the minimum required by this Regulation or by the EMS' statutes,
- on any grounds laid down either in the law in the Member State in which the EMS has its registered office, or in the statutes.

### Article 35 – Winding-up by the court or administrative authority

1. On an application by any person concerned who has a legitimate right or any competent authority, the court or administrative authority of the Member State where an EMS has its registered office must order it to be wound up where it finds that:

- the registered office has been transferred out of the EU
- the EMS's activity being carried on contrary to the public interest in the Member State in which the EMS has its registered office,
- or no longer constitutes the activity such as those set out in Article 4 of the present Regulation,
- or that the formation fund has fallen below the amount laid down in Article 14 of this Regulation.

The court or administrative authority may grant the EMS a period of time to rectify the situation. If it fails to do so within the time allowed, the court or administrative authority shall order it to be wound up.

2. When an EMS no longer complies with the requirement laid down in Article 15 concerning the place of its head office, the Member State in which the EMS's registered office is situated shall take appropriate measures to oblige the EMS to regularize its situation within a specified period either :

- by re-establishing its head office in the Member State in which its registered office is situated, or
- by transferring the registered office by means of the procedure laid down in Article 16. If the EMS does not comply with those measures, the court or administrative authority shall order that the EMS be wound up.

Where the authorities of a Member State establish that the head office of an EMS has been transferred to their territory in breach of Article 16, they shall immediately inform the Member State in which the EMS's registered office is situated.

3. The Member State in which the EMS's registered office is situated shall seek judicial or any other appropriate remedies with suspensory effect with regard to any decisions further to established infringements taken under paragraphs 1 and 2.

### Article 36 – Liquidation of the EMS

1. The winding-up of an EMS shall entail its liquidation

2. The liquidation of an EMS and the conclusion of its liquidation shall be governed by the law of the Member State in which it has its registered office.

3. An EMS in liquidation shall continue to have legal personality until the conclusion of the liquidation.

4. Following the liquidation, the books and records relating to the liquidation shall be lodged at the register referred to in Article 22. Any interested party may examine such books and records.

#### **Article 37 – Distribution**

Net assets shall be distributed in accordance with the principle of disinterested distribution, or, where permitted by the law of the Member State in which the EMS has its registered office, in accordance with an alternative arrangement set out in the statutes of the EMS. For the purposes of this Article, net assets shall comprise residual assets after payment of all amounts due to creditors.

#### **Article 38 – Publication of winding-up**

Without prejudice to provisions of national law requiring additional publication, the initiation and termination of winding-up including voluntary winding-up, liquidation, insolvency or suspension of payment procedures and any decision to continue operating shall be disclosed in accordance with Article 23.

#### **Article 39 – Conversion into a national mutual society**

1. An EMS may be converted into a national mutual society governed by the law of the Member State in which its registered office is situated. No decision on conversion may be taken before two years have elapsed since its registration and before the first two sets of annual accounts have been approved.
2. The conversion of an EMS into a national mutual society shall not result in the winding-up of the EMS nor in the creation of a new legal person.
3. The management or administrative organ of the EMS shall draw up draft terms of conversion and a report explaining and justifying the legal and economic aspects as well as the employment effects of the conversion and indicating the implications of the adoption of the mutual form for members, creditors and employees.
4. The draft terms of conversion shall be made public as laid down in each Member State's law at least one month before the general meeting called to decide on conversion.
5. Before the general meeting referred to in paragraph 6, one or more independent experts appointed or approved, in accordance with the national provisions, by a judicial or administrative authority in the Member State to which the EMS being converted into a national mutual society is subject, shall certify that the latter has assets at least equivalent to its formation fund.
6. The general meeting of the EMS shall approve the draft terms of conversion together with the statutes of the national mutual society under the provisions laid down in article 26.11 of the present Regulation.

#### **Article 40 – Implementing measures**

1. Member States shall make such provisions as is appropriate to ensure the effective application of this Regulation.
2. Each Member State shall designate the competent authorities within the meaning of Articles 16, 19.c, 19.k, 19.l and 35 and shall inform the Commission and the other Member States accordingly.

**Article 41 – Review of the Regulation**

Five years at the latest after the entry into force of this Regulation, the Commission shall forward to the European Parliament and to the Council a report on the application of the Regulation and proposals for amendments, where appropriate. The report shall, in particular, analyse the appropriateness of:

- (a) allowing provisions in the statutes of an EMS adopted by a Member State in execution of authorisations given to the Member States by this Regulation or laws adopted to ensure the effective application of this Regulation with regard to the EMS which deviate from, or are complementary to, these laws, even when such provisions would not be authorised in the statutes of a mutual society having its registered office in the Member State;
- (b) allowing provisions which enable the EMS to split into two or more national mutual societies.
- (c) allowing for specific legal remedies in the case of fraud or error during the registration of an EMS established by way of merger.

**Article 42 – Entry into force**

This Regulation shall enter into force on the third day following its publication in the Official Journal of the European Union.

It shall apply from xx xx 200x.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done in Brussels, xx xx 200x

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