

Milan, 16-18 September 2016

## Draft rules on the law applicable to companies and other bodies

*At its meeting in Milan on 16-18 September 2016, the European Group for Private International Law, giving effect to the results of its meetings in Florence in 2014 and in Luxembourg in 2015, considered the questions of determining the law applicable to companies and of the recognition of foreign companies in the European Union. It adopted a set of draft rules that could serve as a basis for the adoption of an act of the European Union.*

### CHAPTER I: SCOPE

#### Article 1 - Scope

1. This Regulation\* determines the law applicable to companies (*lex societatis*) and other bodies, corporate or unincorporated (hereinafter “companies”). It shall not apply, in particular, to revenue, customs or administrative matters.
2. The following matters shall be excluded from the scope of this Regulation:
  - (a) contractual and non-contractual obligations of the company itself, and the liability in tort of the members and directors of a company vis à vis third parties<sup>1 2 3</sup>;
  - (b) rights *in rem* over shares or other participation rights;
  - (c) insolvency<sup>4</sup>;

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\* Though the title of the text uses a “neutral concept” (Draft Rules), the Group considered preferable to draft its articles in the form of a Regulation.

<sup>1</sup> A Recital should clarify the relationship between this instrument and Rome I and II Regulations: “*The scope of this Regulation extends to matters excluded from the scope of Regulation 594/2008 on contractual obligations (Rome I), Article 1 (2) (f), and Regulation 864/2007 on non-contractual obligations (Rome II), Article 1 (2) (d). The interpretation of this Regulation should as much as possible avoid regulatory gaps between these instruments.*”

<sup>2</sup> A Recital should clarify that the liability of members and directors (“as such”) is governed by this instrument [“*This Regulation determines the law applicable to the liability of members and directors of a company as such for the obligations of the company. Conversely, the liability in tort of members and directors of a company vis à vis third parties, in particular resulting from misrepresentation or undercapitalization, should be governed by Regulation 864/2007. In this case, the law applicable to the company may, if appropriate and as a matter of fact, be taken into account when judging the conduct of members and directors.*”].

<sup>3</sup> A Recital should clarify that this instrument applies to groups of companies but does not establish any special conflict of law rule on this matter [“*In accordance with the conflict-of-law rules of this Regulation, where one undertaking controls another governed by a different law, its ensuing rights and obligations as regards the protection of minority shareholders and third parties are governed by the law governing the controlled undertaking, without prejudice to the obligations imposed on the controlling undertaking by its own law, for example the requirement to prepare consolidated accounts.*”].

<sup>4</sup> A Recital should clarify that the effects of insolvency proceedings upon the capital structure of a company, e.g. a debt-for-equity swap, shall be governed by the *lex concursus*, not by the *lex societatis* [“*The effects of insolvency proceedings on the capital structure of the company and in particular the conversion of debt into equity shall be governed by the law determined by Regulation 2015/848 on insolvency proceedings.*”].

- (d) the constitution of trusts and the relationship between settlors, trustees and beneficiaries; and
- (e) labour relationships and employees rights, including rights of participation in the organs of the company.

3. This Regulation does not prejudice the fulfilment of the obligations deriving from social responsibility of companies (*corporate social responsibility*) as defined by national, European or international norms.

### **Article 2 - Universal application**

Any law specified by this Regulation shall be applied whether or not it is the law of a Member State.

## **CHAPTER II. APPLICABLE LAW**

### **Article 3 - General rule**

A company shall be governed by the law of the country under which it has been incorporated or, if it is an unincorporated entity, under which it has been formed.

### **Article 4 - Default rule**

Where the law applicable cannot be determined under Article 3, a company shall be governed by the law of the country within the territory of which its central administration is located at the moment of formation of the company. However, if the company is manifestly more closely connected with the law of another country, that law will apply.

### **Article 5 - Scope of the applicable law**

The law designated by Articles 3 and 4 shall govern, in particular:

- (a) the foundation of the company, including liability for acts performed on behalf of a company before its incorporation, its re-organization and winding-up;
- (b) the name of the company;
- (c) without prejudice to Article 6, its legal nature, general capacity, capacity to act and representative bodies;
- (d) its internal functioning, organization and capital structure;
- (e) accounts, auditing and disclosure;
- (f) membership, including:
  - (i) conditions of membership;
  - (ii) the rights and obligations associated with membership;
  - (iii) the acquisition and disposition of those rights; and
  - (iv) entitlement to exercise the rights of shareholders against the company;

- (g) the liability of directors vis à vis the members of the company and the company itself;
- (h) the liability of members vis à vis others members of the company and the company itself;
- (i) without prejudice to Article 7, the liability of directors and members for obligations of the company; and
- (j) the consequences of failure to fulfil the formal requirements for incorporation on the validity of the incorporation of a company.

#### **Article 6 - Capacity**

The capacity of a company to enter into legal relationships with third parties and the powers of its organs or officers shall be governed by the law determined in accordance with Articles 3 and 4. Nevertheless, any restrictions or limitations established by such law cannot be invoked against third parties when the relationship was concluded between persons both of whom are in the same country which is not that of the governing law of the company, under the law of which those restrictions or limitations do not exist, unless those third parties were aware of them or were not aware of them as a result of their negligence.

#### **Article 7 - Disclosure**

A company operating in the European Union must disclose to third parties the country under the law of which the company is formed. If it fails to do so, any creditor of that company may claim that the liability of a person acting on behalf of the company, its members or directors shall be governed by the law of the Member State where that person was acting, unless such creditor was aware of that information or was not aware of it as a result of his negligence.

### **CHAPTER III. CHANGE OF APPLICABLE LAW**

#### **Article 8 - Change of applicable law**

1. In this provision “old law” means the law applicable to a company before the change of applicable law and “new law” means the law applicable to a company after such change.
2. The law applicable to a company may be changed without its losing its legal personality if this is possible under both the old law and the new law.
3. Where such a change takes place, the old law shall apply, in particular, to measures for the protection of minority shareholders and creditors of the company.
4. The new law shall determine the conditions of re-incorporation of the company.

#### **Article 9 - Companies of Member States**

1. A company governed by the law of a Member State may change its applicable law, in accordance with Articles 3 and 4, in favour of the law of another Member State without losing its legal personality.

2. A company governed by the law of a Member State may change its applicable law, in accordance with Articles 3 and 4, in favour of the law of a third country, without losing its legal personality, if this is permitted by the law of the third country.

3. A company incorporated in a third country may change its applicable law, in accordance with Articles 3 and 4, in favour of the law of a Member State, without losing its legal personality, if this is permitted by the law of the third country.

## **CHAPTER IV. OTHER PROVISIONS**

### **Article 10 - Overriding mandatory provisions**

1. Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the company under this Regulation.

2. Nothing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum.

3. Effect may be given to the overriding mandatory provisions of the law of another country in which the company has its central administration or is carrying on activities. In considering whether to give effect to those provisions, regard shall be had to their nature and purpose and to the consequences of their application or non-application.

### **Article 11 - Public policy of the forum**

The application of a provision of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (*ordre public*) of the forum.

### **Article 12 - States with more than one legal system**

Where a State comprises several territorial units, each of which has its own rules of law in respect of the matters covered by this Regulation, each territorial unit shall be considered as a country for the purposes of identifying the law applicable under this Regulation.

### **Article 13 - Exclusion of renvoi**

The application of the law of any country specified by this Regulation means the application of the rules of law in force in that country other than its rules of private international law.

### **Article 14 - International agreements**

This Regulation shall not prejudice the application of international conventions to which one or more Member States are parties at the time when this Regulation is adopted and which lay down conflict-of-law rules relating to companies. Member States shall notify the Commission of all the convention referred to in this Article.

### **Article 15 - Relationship with other provisions of European law**

This Regulation shall not prejudice the application of provisions of the law of the European Union which:

- a) lay down conflict-of-law rules relating to certain types of companies; or
- b) establish conditions of access to the exercise of activities and affect the formation of the company, its internal functioning or its winding-up.

### **Article 16 - Entry into force and application in time**

This Regulation shall enter into force on the twentieth day following its publication in the *Official Journal of the European Union*. It shall apply from... [two years after its entry into force]

### **Article 17 - Transitional rule**

1. A company validly created before the date of application of this Regulation continues to be validly created after such date.
2. A company not validly created before the date of application of this Regulation is deemed to have been validly created if its creation would have been valid under this Regulation.