



EUROPEAN COMMISSION

Brussels, 25.9.2014
C(2014) 6855 final

Dear President,

The Commission would like to thank the Bundesrat for its Opinion concerning the proposal for a Directive of the European Parliament and of the Council on single-member private limited liability companies {COM (2014) 212 final}.

The Commission takes due note of the detailed comments and contribution made by the Bundesrat to the discussion on the Commission proposal. It appreciates that the Bundesrat welcomes the objective to improve the framework for cross-border activities of Small and Medium Sized Enterprises (SMEs) and that it recognises that Union-wide harmonisation of the founding of limited liability companies could foster this goal.

The Commission notes the observations of the Bundesrat, in particular concerning the legal basis, the on-line registration, the minimum capital, the possibility of separation of registered office and central administration, and the overall suitability of the system proposed, as well as of the specific issues raised with a view to individual provisions of the proposal.

As regards the legal basis, the Commission does not share the Bundesrat's view that the proposal is not covered by any legal basis insofar as it requires Member States to provide for a company law form for a "Societas Unius Personae" (SUP) also for purely domestic situations.

Firstly, Article 50 TFEU on which the proposal is based provides for the EU competence to act in the area of company law with a view to attaining freedom of establishment. Article 50(2) TFEU contains a non-exhaustive list of options how this competence is to be carried out. Paragraph 2 point f provides – as one of those options – for progressive abolition of restrictions on freedom of establishment as regards the conditions for setting up subsidiaries. This option is particularly relevant for the present proposal as it is indeed aimed at facilitating setting up subsidiaries. However, the competence under Article 50 TFEU is not limited to this option but covers in general, as laid out in Article 50(1) TFEU, action by means of directives in order to attain freedom of establishment as regards a particular activity related to this freedom. Also, this legal basis is not limited to cross-border action; neither Article 50(1) nor Article 50(2)(f) TFEU contain a cross-border requirement. In the

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past, both the Directive on domestic divisions¹ and the Directive on domestic mergers² have been based on Article 50 TFEU or a predecessor provision. The same reasoning applies to the current Directive on single-member private limited liability companies³ which provides for rules applicable to single-member companies active only in the country of their registration as well as to companies active abroad.

Secondly, the Commission does not share the Bundesrat's view that EU law does not provide competence to regulate purely domestic situations in this case, given that all Member States already provide for a form of single member private limited liability company in their national law for such situations. It is precisely the diversity of rules on establishment and operation of such companies across Member States, which justifies harmonisation at EU level. In any event, restricting the proposal to cases with a cross-border dimension, e.g. to companies that would have the intention to be active cross-border, would neither be desirable nor practical. Some conceivable cross-border requirements would be purely formal and could be easily circumvented; others would be difficult to monitor and would thus impose unnecessary additional administrative burden for Member States as regards control.

As far as the on-line registration is concerned, the Commission considers the provisions relating to the registration procedure as the main part of the proposed Directive, registration being a critical issue in facilitating the establishment of subsidiaries in EU countries other than the home country of the company. It is also in line with the view of the stakeholders expressed during the 2013 on-line consultation since 64 % of respondents (80% of companies, 67 % of business federations) considered that a potential initiative on single-member companies should include simple rules for on-line company registration with one common standard registration form throughout the EU⁴.

As regards the concerns raised by the Bundesrat relating to identification, the proposed Directive would establish a system where it is for the Member States to lay down rules for the verification of identity in the context of registration. In particular, as spelt out in recital 18, Member States should be able to maintain existing rules concerning the verification of the registration process, provided that the whole registration procedure may be completed electronically and at a distance. As regards electronic identification, the Commission wishes to point to the Regulation of the European Parliament and of the Council on electronic identification and trust services for electronic transactions in the internal market⁵ that lays down conditions under which Member States shall recognise electronic identification means

¹ Directive 2011/35/EU of the European Parliament and of the Council of 5 April 2011 concerning mergers of public limited liability companies (codification) (OJ L 110, 29.4.2011, p. 1).

² Sixth Council Directive of 17 December 1982 based on Article 54(3)(g) of the Treaty, concerning the division of public limited liability companies (OJ L 378, 31.12.1982, p. 47).

³ Directive 2009/102/EC of the European Parliament and of the Council of 16 September 2009 in the area of company law on single-member private limited liability companies (OJ L 258, 1.10.2009, p. 20).

⁴ See the Impact Assessment accompanying the proposal for a Directive of the European Parliament and of the Council on single-member private limited liability companies (SWD(2014) 124), p. 29.

⁵ Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC (OJ L 257, 28.8.2014, p. 73).

of natural and legal persons falling under a notified electronic identification scheme of another Member State.

The Commission takes note of the concerns raised by the Bundesrat concerning risks of manipulation or abuse inherent to an on-line registration procedure without involvement of notaries or courts ("vorsorgende Rechtspflege"). The Commission takes such concerns very seriously, but it has no evidence that the possibilities which would be offered by the proposed Directive were particularly susceptible to manipulation and abuse. Especially the experiences of those Member States which already provide for a possibility of direct on-line registration without the necessity of the prior involvement of a notary/attorney⁶ do not confirm these concerns. The Commission also wishes to emphasise that Member States would be free to involve notaries and/or courts as long as they offer an online-registration system which complies with the proposed requirements.

Furthermore, the Commission shares the Bundesrat's view that a rapid on-line registration might not be suitable for all registrations, in particularly not for more complex ones with contributions other than in cash. For that reason, the Commission discarded the option of allowing on-line registration only, and proposed to provide for both on-line and other types of registration (e.g. on paper, via company agent, notary), leaving the ultimate choice for the companies.

Concerning the provisions relating to the capital of a SUP, the system proposed – combining a minimum capital requirement of EUR 1 with the requirement of a balance sheet test and a solvency statement to protect creditors – has been identified in the Impact Assessment as the option which offers the most savings for company founders while guaranteeing a high standard of creditors' protection. In general, the founder of a company must have some capital to run a business or needs to borrow it regardless of the level of minimum capital required by the national legislation. The minimum capital requirement can constitute a barrier for many founders if they have to pay in more capital than they would normally put into business if there had been no such requirement. Furthermore, even a high minimum capital requirement does not necessarily ensure that the same level of capital would indeed be available to creditors at a later stage. A number of Member States which have a minimum capital requirement of EUR 1 already provide for the cumulative balance sheet and solvency test in order to provide additional creditor protection. The proposed approach means that companies, in exchange for a low minimum capital requirement, would have to attach more importance to liquidity questions prior to distributions. The personal liability of management and of the single-member guarantees the high standard of creditors' protection. As regards an obligation to file for bankruptcy as mentioned by the Bundesrat, this is indeed left to national laws. Substantive insolvency law is not harmonised in the European Union, and the legal basis would also not cover such measure.

As regards the possible separation of the registered office and the central administration of a SUP, the Commission underlines that this approach is compatible with the case-law of the

⁶ Currently, 16 Member States provide for this possibility, see for details the Impact assessment accompanying the proposal (SWD(2014) 0124), p. 27.

Court of Justice, which allows a company having its registered office in one Member State to have its central administration in another Member State, and according to which Member States have to recognise companies established in other Member States even if these companies may not have their registered office and central administration in the same country. The proposed solution would considerably facilitate the exercise of the freedom of establishment for SUPs by giving them full freedom to choose the location of the registered office and the central place of administration. It also corresponds to the current situation in German law concerning limited liability companies ("GmbH").

The Commission takes note of the concerns raised by the Bundesrat in this context relating to the risk of "forum shopping" and of circumvention of national laws, in particular related to employee protection, tax and creditor protection. The Commission believes that the risk of extensive forum shopping following from the adoption of this proposal is overestimated, but leaves it to the EU co-legislators – the Council and the European Parliament – to further assess this risk. As for creditor protection, the proposal contains provisions – the requirement of a balance sheet test and a solvency statement for distribution – which would be harmonised EU wide so that no circumvention through forum shopping would be possible in that respect.

Finally the Commission does not share the Bundesrat's view that the system proposed is not suitable to reach the objective to facilitate cross-border activities of SMEs. The requirements laid down in the proposed directive for SUP would indeed have to be transposed in 28 different legal orders, and national law would continue to apply outside the scope of harmonisation of the proposed directive. However, this would still achieve a considerable degree of harmonisation and thus simplification for cross-border activities of SMEs, as the elements covered by the proposal are those that are the most relevant in a cross-border context. Also, the possibility for cross-border on-line registration without the need to personally travel would significantly simplify the founding of new companies and reduce costs. The uniform templates for articles of association and for registration which would be available in all official EU languages would substantially facilitate registration and operation of SUPs.

The points made above refer to the initial proposal presented by the Commission, which is currently in the legislative process involving both the European Parliament and the Council at which your government is represented.

The Commission hopes that these clarifications address the main concerns raised by the Bundesrat and looks forward to continuing our political dialogue in the future.

Yours faithfully,

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Vice-President*