



EUROPEAN COMMISSION

Brussels, 12.8.2014  
C(2014) 5875 final

*Dear President,*

*The Commission would like to thank the Nationalrat for its Reasoned 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 note that the Nationalrat finds that the proposal on single-member private limited liability companies does not comply with the principle of subsidiarity. The Commission also takes note of Nationalrat's concerns regarding the legal basis for the proposal and the possible misuse of the instrument. The Commission would like to respond in the following way to Nationalrat's argumentation:*

*First, as regards the arguments that Article 50 TFEU is not the appropriate legal basis for this proposal the Commission would like to underline that it does not share the views of the Nationalrat. Article 50 TFEU provides for the EU competence to act in the area of company law with a view to attaining freedom of establishment. In particular, Article 50(2)(f) TFEU provides for progressive abolition of restrictions on freedom of establishment as regards the conditions for setting up subsidiaries.*

*The Commission observes that in order to justify doubts as regards the legal basis, the Nationalrat refers to the judgment of the European Court of Justice in Case C-436/03 on the European Cooperative Society. However, the Commission takes the view that the proposal on single-member private limited liability companies differs fundamentally from the regulation contested in that case.*

*In Case C-436/03, the Court of Justice made a clear distinction between national forms for companies and those having “specific Community character”. The Court found that the European Cooperative Society introduced a new supranational form which coexists with cooperative societies under national law. However, the proposed Directive on single-member private limited liability companies does not establish a supranational legal form, as it was indeed the case with the European Cooperative Society in case C-436/03. On the contrary, it seeks to harmonise a number of requirements applicable to single-member private limited liability companies and does not aim to introduce a new legal form in addition to the national forms of private limited liability companies. It even states expressly in its recital 10 that flexibility should be afforded to Member States as regards the manner and extent to which*

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*they wish to apply harmonised rules governing the formation and operation of Societas Unius Personae (SUP). Member States would be free to choose whether they wish to apply the provisions provided for in the proposed Directive to companies falling into its scope, or whether they wish to go further and establish a separate national company law form for single-member private limited liability companies, in parallel with other national forms for this type of companies. Even in the latter case, this would continue to be a national and not a supranational legal form.*

*Additional requirements proposed in the Directive to which the Nationalrat refers in its Reasoned Opinion, such as the requirement to add the abbreviation SUP to the name of the companies in question, or to use uniform templates for the registration, do not put this conclusion into question. Once transposed, the provisions of the proposed Directive would be part of national law and would not coexist with national law, as in the case of the European Cooperative Society or European Company.*

*It follows from the above that Article 50 TFEU constitutes an appropriate legal basis for the proposed Directive. Consequently, in the Commission's view, it would even be erroneous to have recourse to Article 352 TFEU, as suggested. It is worth reminding that Article 352 TFEU is a subsidiary legal basis and only applicable in case the Treaties provide no other legal basis. In any event, even if Article 352 TFEU had been used as a legal basis, the proposal would still have been subject to subsidiarity control.*

*Furthermore, the Commission disagrees with Nationalrat's arguments that the proposal does not comply with the principle of subsidiarity. The Commission is convinced that the proposal for a Directive on single-member private limited liability companies fully complies with the principle of subsidiarity as enshrined in Article 5(3) of the TFEU, i.e. that the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.*

*As laid out in point 3 of the Explanatory Memorandum to the proposal as well as in section 5.2 of the Impact Assessment accompanying the proposal, the solutions adopted so far by individual Member States with regard to the reduction of set-up costs have not been coordinated at EU level. Such coordination among Member States, which would aim at introducing in national legal systems identical requirements for a particular national company law form, appears unlikely. Instead, it is likely that individual actions by Member States will continue to result in divergent outcomes, as illustrated in detail by the Impact Assessment (see section 5.1 on national reforms of company law).*

*In particular, individual actions by Member States, most often, focus on their specific national context and usually would not seek to facilitate cross-border establishments. For instance, a requirement of a physical presence before the notary or any other authority of the Member State of registration, although not directly discriminatory, has a different impact, including in terms of costs, on residents and non-residents. Also, in most Member States, on-line registration of a company is accessible in practice only to nationals or residents.*

*Therefore, without any action at EU level national and non-harmonised solutions would be available and SMEs would continue to face barriers and incur difficulties and excessive costs when expanding cross-borders. Consequently, the Commission believes that targeted EU intervention as proposed in the Directive in question complies with the principle of subsidiarity.*

*In the Commission's view the proposed Directive on single-member private limited liability companies also complies fully with the principle of proportionality as laid down in Article 5(4) of the TEU according to which the content and form of the EU action shall not exceed what is necessary to achieve the objectives of the policy pursued. In particular, the proposed action would not go beyond what is necessary to achieve the objective of facilitating and encouraging the set-up of companies: it does not attempt to fully harmonise all aspects related to the operation of single-member limited liability companies, but is limited to those issues identified as crucial in the cross-border context.*

*The Commission finally takes note of the concerns raised by the Nationalrat about a possible misuse of the instrument. The Commission takes such concerns seriously, but does not share Nationalrat's position with regards to the risk of misuse being more significant than in case of other pieces of EU legislation especially in the light of Member States' experience with direct on-line registration and the obligation imposed by the proposal to identify the beneficial owner of an SUP. In Commission's view the existence of such theoretical risks should not prevent the Union to adopt measures aimed at facilitating cross-business and leading to the realisation of the untapped potential of the Internal Market, which contributes to growth and jobs in the EU. It should be remembered in this context that the Internal Market is based on the principle of mutual recognition of company law forms. As laid down in the jurisprudence of the Court of Justice, Member States have to accept companies established in other Member States even if these companies may not have their registered and real offices in the same country.*

*The points made above are based on 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 concerns raised by Nationalrat and looks forward to continuing our political dialogue in the future.*

*Yours faithfully,*

*Michel BARNIER  
Member of the Commission*