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OPINION OF THE LEGAL SERVICE¹

From: Legal Service

To: Working Party on Company Law

Subject: Proposal for a Directive of the European Parliament and of the Council on
single-member private limited liability companies
- Legal basis

I. INTRODUCTION

1. On 9 April 2014, the Commission presented a proposal for a Directive of the European Parliament and of the Council on single-member private limited liability companies². The Commission has chosen Article 50 TFEU as the legal basis.

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² COM(2014) 212 final, 8842/14.

2. In the context of the Working Party on Company Law's discussions on the proposal, the Council Legal Service ("CLS") was asked to give its opinion on the appropriateness of that legal basis. A number of delegations consider that the proposed Directive should be adopted on the basis of Article 352 TFEU, insofar as the Directive would create a new form of European company. In this regard, they cite the judgment of 2 May 2006 in Case C-436/03, *Parliament v Council*³, on the European Cooperative Society.
3. This opinion constitutes the response to that request, and develops and clarifies the oral statement made by the representative of the CLS.

II. LEGAL BACKGROUND

A. Case-law of the Court of Justice on the choice of a legal basis

4. According to well established case-law, the choice of the legal basis for a Union act must be based on objective factors which are amenable to judicial review and which include, in particular, the aim and content of the measure. If a Union measure pursues a twofold purpose or has twofold or manifold components, and if one of those is identifiable as the main or predominant purpose or component, whereas the other is merely incidental, the measure must be based on a single legal basis, namely that required by the main or predominant purpose or component. Only exceptionally, if it is established that the measure simultaneously pursues a number of objectives, inextricably linked, without one being secondary and indirect in relation to the other, may such a measure be founded on the various corresponding legal bases if the procedures provided for by those legal bases are compatible.⁴

³ EU:C:2006:277.

⁴ See, in particular, the judgment of 6 November 2008 in Case C-155/07, *Parliament v Council* (EU:C:2008:605), paragraphs 34 to 37, and the judgment of 19 July 2012 in Case C-130/10, *Parliament v Council* (EU:C:2012:472), paragraphs 42 to 45.

B. The relevant Treaty provisions

1) Article 50 TFEU

5. Article 50 TFEU provides:

"1. In order to attain freedom of establishment as regards a particular activity, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, shall act by means of directives.

2. The European Parliament, the Council and the Commission shall carry out the duties devolving upon them under the preceding provisions, in particular:

[...]

(f) by effecting the progressive abolition of restrictions on freedom of establishment in every branch of activity under consideration [...] as regards the conditions for setting up agencies, branches or subsidiaries in the territory of a Member State [...]."

6. Recourse may be had to that provision to approximate or harmonise national company laws⁵.

7. Although it deals with the adoption of directives "*as regards a particular activity*" (Article 50(1) TFEU) or "*branch of activity under consideration*" (point (f) of Article 50(2) TFEU), Article 50 TFEU should be interpreted as also allowing the adoption of general directives applicable to any field of activity. The objective of Article 50 TFEU is to provide a legal basis for the adoption of directives in order to attain freedom of establishment. It would run counter to that objective to interpret Article 50 TFEU narrowly as allowing the approximation of national company laws in specific *sectoral* areas only. Furthermore, while

⁵ See, to that effect, the judgment of 9 March 1999 in Case C-212/97, *Centros* (EU:C:1999:126), paragraph 28. In this regard, see also the conclusions of Advocate-General Stix-Hackl in the judgment of 2 May 2006, *Parliament v Council* (cited above), paragraphs 40 and 41.

Article 50 TFEU may refer to the adoption of directives "*as regards a particular activity*" or "*branch of activity under consideration*", its scope is not limited to identified sectoral areas of activity. Thus, Article 50 TFEU allows the Union legislator to adopt directives on company law in *all* fields of activity. Under these circumstances, it must be deemed that the Union legislator is empowered to adopt, on the basis of Article 50 TFEU, not only sectoral directives limited to a specific field of activity but also general directives applicable to all fields of activity.

8. Neither the Court of Justice nor the General Court has expressly validated that interpretation of Article 50 TFEU; however, on reading certain judgments and orders, they can be considered to have implicitly accepted it. Thus, in its order of 23 September 2004 in the *Springer*⁶ case, the Court deemed that Council Directive 90/605/EEC of 8 November 1990 amending Directive 78/660/EEC on annual accounts and Directive 83/349/EEC on consolidated accounts as regards the scope of those Directives had been validly adopted on the basis of point (g) of former Article 54(3) EC (now point (g) of Article 50(2) TFEU) without questioning the general nature of that Directive. Similarly, in its judgment of 21 June 2006 in the *Danzer v Council*⁷ case, the General Court deemed that former Article 44 EC (now Article 50 TFEU) was an appropriate legal basis for Council Directive 68/151/EEC of 9 March 1968 on coordination of

⁶ Order of 23 September 2004 in Case C-435/02, *Springer* (EU:C:2004:552), paragraphs 25 to 35.

⁷ Judgment of 21 June 2006 in Case T-47/02, *Danzer v Council* (EU:T:2006:167), paragraph 49.

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 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community and for the Fourth Council Directive 78/660/EEC of 25 July 1978, also without questioning their general nature⁸.

9. Furthermore, although it refers only to the conditions for setting up agencies, branches or subsidiaries (secondary establishment), point (f) of Article 50(2) TFEU must be interpreted as also covering primary establishment (creation of the initial company). From a legal viewpoint, there is no difference between the creation of an initial company and the creation of a subsidiary, branch or permanent office. In addition, here too it would run counter to the objective pursued, namely to attain freedom of establishment, to interpret point (f) of Article 50(2) TFEU narrowly as being limited to secondary establishment^{9, 10}.

⁸ In support of such an interpretation of Article 50 TFEU, see also to that effect the judgment of 30 September 2003 in Case C-167/01, *Inspire Art* (EU:C:2003:512), paragraphs 6 and 7, and the conclusions of Advocate-General Alber in paragraph 104 of that judgment.

It is also worth highlighting that such an interpretation is in line with institutional practice. Article 50 TFEU has served as the legal basis for the adoption of many general directives on company law, such as Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies.

⁹ Furthermore, Article 50 TFEU has served as the legal basis for certain directives applicable to both primary and secondary establishment, in particular 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.

¹⁰ Use of Article 114 TFEU could be considered for greater harmonisation than is possible by means of a directive based on Article 50 TFEU; however, this is not the case here.

2) Article 352 TFEU

10. Article 352 TFEU provides:

"1. If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures. Where the measures in question are adopted by the Council in accordance with a special legislative procedure, it shall also act unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament.

[...]"

11. According to settled case-law, the legislator may have recourse to Article 352 TFEU only if, on the one hand, its action should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties and if, on the other hand, no other provision of the Treaties gives the Union institutions the necessary power to undertake that action¹¹.
12. Therefore, Article 352 TFEU would constitute the appropriate legal basis for this proposal only if Article 50 TFEU, or any other provision of the Treaty, were insufficient as a basis for adoption of the Directive.

¹¹ See, for example, the judgment of 2 May 2006, *Parliament v Council*, cited above, paragraph 37, and the judgment of 3 September 2009, *Parliament v Council*, C-166/07, EU:C:2009:499, paragraph 49; see also paragraph 18 of the opinion of the CLS of 15 November 2013, 16280/13 JUR 587 ECOFIN 1021 UEM 381, on the proposal for a Council Regulation establishing a facility for providing financial assistance for Member States whose currency is not the euro.

C. Judgment of the Court of 2 May 2006 in Case C-436/03, *Parliament v Council*, on the European Cooperative Society

13. In the judgment of 2 May 2006, *Parliament v Council*, cited above, the Court held that Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society had been lawfully adopted on the basis of former Article 308 EC (now Article 352 TFEU) and that former Article 95 EC (now Article 114 TFEU) could not constitute an appropriate legal basis for that Regulation.
14. According to the Court, although Member States' national laws could be harmonised under Article 95, only Article 308 EC could be used to create a new form of European cooperative society in addition to national forms.
15. The Court ruled, firstly, that the legal form of the European Cooperative Society was governed first and foremost by Regulation (EC) No 1435/2003 and that it was merely in the alternative that the Regulation referred to national law. The Court went on to affirm that the conditions of formation of a European cooperative society, and the transfer of its seat, were specific to that form of society, in particular the possibility of it transferring its registered office from one Member State to another, without that resulting in the winding-up of the European cooperative society or in the creation of a new legal person. Lastly, the Court said that it was apparent from Regulation (EC) No 1435/2003 that the European cooperative society was a form which coexisted with cooperative societies under national law. The Court therefore concluded that the contested regulation left unchanged the national laws already in existence and could not be regarded as aiming to approximate the laws of the Member States applicable to cooperative societies. In the view of the Court, the purpose of Regulation (EC) No 1435/2003 was to create a new form of cooperative society in addition to the national forms.
16. The Court accordingly found that Article 95 EC could not constitute an appropriate legal basis for Regulation (EC) No 1435/2003, which had been correctly adopted on the basis of Article 308 EC.

III. LEGAL ANALYSIS

A) The aim and content of the proposed Directive

17. It is apparent from the preamble of the proposed Directive that it aims to facilitate the cross-border activities of SMEs and the establishment of single-member companies as subsidiaries in other Member States by reducing the costs and administrative burdens involved in setting up these companies, thereby gradually abolishing restrictions on freedom of establishment and enabling businesses to enjoy the full benefit of the internal market (recitals 7, 8, 12 and 13).
18. To achieve this objective, the proposed Directive introduces a harmonised framework governing the formation of single-member companies which is applicable to the types of company listed in Annex I to the Directive, the *Societas Unius Personae* (SUP) defined in Article 6 of the Directive and any other company established as a single-member company within the meaning of national law (Article 1).
19. Thus, on the one hand, the proposed Directive lays down harmonised provisions, applicable to any single-member company, with regard to disclosure, general meetings and contracts between the single member and the company (Part 1, Articles 3 to 5).
20. On the other hand, the proposed Directive lays down a harmonised set of rules governing the formation of SUPs (Part 2).
21. According to Article 6(1) and Article 14(1) of the proposed Directive, an SUP is a single-member company set up in accordance with the rules laid down in Part 2 of that Directive and registered as such in the Member State in which it has its registered office.

22. Those rules are contained in Articles 7 to 25 of the proposed Directive. The provisions in question define, *inter alia*, the general principles applicable to all SUPs (Article 7), the conditions governing the formation of an SUP (Articles 8 and 9), the questions that must be covered in the articles of association of the SUP and amendments to those articles of association (Articles 11 and 12), the formalities relating to registration and the information and documentation that Member States may require for this purpose (Article 13), the procedures and formalities for registration of an SUP in the Member State in which it has its registered office (Article 14) and the conditions under which an SUP may acquire legal personality (Article 14). The proposed Directive also contains provisions governing the issue and acquisition of shares (Article 15), the amount of share capital and how the capital is to be subscribed (Article 16), share capital reduction (Article 20), payment of consideration (Article 17) and distributions (Articles 18 and 19). Lastly, the proposed Directive lays down provisions governing the powers of the single member and the arrangements for the performance of its duties (Articles 21 and 23), the management of the company (Articles 22 and 24) and the conversion of an SUP into another company law form (Article 25).
23. Article 7(4) of the proposed Directive stipulates that the SUP and its articles of association is to be governed by the national law of the Member State where the SUP is registered, i.e. by the national law of the Member State in which it has its registered office.

24. Finally, the proposed Directive adds that the Member States have the choice either to apply the rules laid down in the Directive to all single-member private limited liability companies, or to provide for the establishment of SUPs as a separate legal form of company which would exist in parallel with other forms of single-member private limited liability company provided for in national law (recital 10).

B. Article 50 TFEU is the correct legal basis for the proposed Directive

25. Firstly, as indicated in paragraphs 7 to 9 of this opinion, the fact that the proposed Directive would not be limited to a particular field of activity, but would be general in nature and would apply to both primary and secondary establishment, would not prejudice the use of Article 50 TFEU.
26. Furthermore, in the light of paragraph 17 of this opinion, it is clear that the aim of the proposed Directive is linked to point (f) of Article 50(2) TFEU.
27. The content of the proposed Directive is also linked to point (f) of Article 50(2) TFEU. On the one hand, it is apparent from paragraphs 18 to 23 of this opinion that the proposed Directive contains a set of rules pertaining to the conditions for setting up single-member private limited liability companies on the territory of each Member State.
28. On the other hand, even if the assumption – by analogous application of the conclusion of the judgment of 2 May 2006, *Parliament v Council*, cited above – is that the use of Article 50 TFEU is justified only when the measure in question is designed to approximate the national legislation applicable to company law, and not to create a new legal form of European company which supersedes national forms of companies, the CLS considers that the proposed Directive is

in fact designed to approximate the national legislation applicable to single-member private limited companies and not to create a new supranational form of European single-member company which would be governed first and foremost by the said Directive and which would supersede national forms of single-member company without affecting national law¹².

29. Firstly, although this is not legally decisive, the form of the proposed act points to such an interpretation, since once the Commission has proposed the adoption of a directive, and not a regulation, the regime in question will be one of national law, even if, from a substantive point of view, the rules governing the setting up of an SUP will be set by an act of the Union. Therefore, the proposed Directive does not create a twenty-ninth form of supranational single-member company which supersedes national forms of single-member company, but harmonises the national rules governing the setting up of single-member companies by creating a new national form of single-member company which is identical in all Member States¹³.
30. Secondly, it seems that, unlike, in particular, the European Cooperative Society, which is governed first and foremost by Regulation No 1435/2003, the SUP is a purely national company, set up on the basis of national provisions and in accordance with those national provisions – even though those provisions may be harmonised – and not a supranational form of single-member company governed first and foremost by an act of the Union and set up directly on the basis of such an act.

¹² This is what distinguishes the proposed Directive from the proposals for a Council Regulation and additional Directive on the Statute for a European company, from the amended proposal for a Council Regulation on the Statute for a European association, and from the proposal for a Council Regulation on the Statute for a European private company, which were the subject of the CLS opinions of 29 January 1990, 4261/90 JUR 13, 20 June 1996, 8448/96 JUR 199 DRS, and 28 November 2008, 16464/08 JUR 537 DRS 75.

¹³ See also, to that effect, the CLS opinion of 16 March 2012, 7139/12, JUR 116 JUSTCIV 77 CONSOM 27 CODEC 534, on the proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, paragraphs 25 and 26.

31. First of all, as indicated in paragraph 23 of this opinion, although the proposed Directive includes specific rules governing the setting up of an SUP, the SUP and its articles of association are, in accordance with Article 7(4) of the Directive, governed by the national law of the Member State of registration. Moreover, it is apparent from the proposed Directive that the SUP registration procedure is completed before the national competent authorities (recital 13 and Articles 13 and 14), that the SUP is registered in the Member State in which it is to have its registered office (Article 14) and that the legal personality of the SUP is granted by the Member State of registration (Article 7(1)). In this respect, it falls to the Member State of registration to ensure in particular that the requirements for setting up an SUP have been met (Article 9(3)), and to define the rules that the articles of association of an SUP must comply with, subject to the minimum rules laid down in Article 11 of the proposed Directive. The SUP is thus still governed by the national law of the Member States, even though the applicable national provisions are harmonised by the proposed Directive.
32. Furthermore, the SUP cannot be regarded as equivalent to a supranational form of company, as it does not have the characteristics of a supranational company. In particular, unlike Regulation No 1435/2003 on the European Cooperative Society, the proposed Directive does not provide for the possibility of transferring the registered office of an SUP from one Member State to another without first dissolving or liquidating it.
33. Thirdly, and in connection with the above, while a new legal form of European company could be created only through the adoption of an act of a Union, the aim of the proposed Directive, i.e. to progressively abolish the restrictions on freedom of establishment and reduce costs through the adoption of common rules governing the setting up of single-member companies, could theoretically be achieved by the simultaneous adoption of identical national legislation in the twenty-eight Member States, which is the very nature of a harmonisation measure¹⁴.

¹⁴ See, on this point, the CLS opinion of 16 March 2012, cited above, paragraphs 19 to 21, and the interpretation *a contrario* of the conclusions of Advocate-General Stix-Hackl, in the judgment of 2 May 2006, *Parliament v Council*, cited above, paragraph 94.

34. Fourthly, unlike Regulation No 1435/2003, the proposed Directive will not leave national legislation on single-member companies unchanged. Even if, as recital 10 of the proposed Directive permits, the Member States choose to provide for the setting up of SUPs in a separate legal form which would exist in parallel with other forms of single-member private limited liability company provided for in national law, and not to apply the rules of the Directive to all single-member private limited liability companies, the Member States will have to amend their national legislation to allow for the registration of single-member companies in the form of an SUP in accordance with the rules laid down by the proposed Directive.
35. In the light of the above, there are strong reasons to consider that, unlike Regulation No 1435/2003 on the European Cooperative Society, the proposed Directive aims to approximate the national legislation of the Member States to allow the creation of a national company with new, uniform articles of association and not to create a new supranational form of European single-member company which would be first and foremost governed by the said Directive and which would supersede national forms of single-member company without affecting national law.

IV. CONCLUSION

36. Article 50 TFEU is the correct legal basis for the proposed Directive.