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**OPINION OF THE LEGAL SERVICE\***

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to: Permanent Representatives Committee

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No Cion prop.: 11252/08 DRS 17

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Subject: Proposal for a Council Regulation on the Statute for a European private company

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At the Coreper meeting on 26 November, the Legal Service of the Council was asked to answer questions as to the compatibility of the proposal for a Regulation on the Statute for a European private company with Article 308 of the EC Treaty, which is its legal basis, and its compatibility with the principle of subsidiarity. The Legal Service was then asked to confirm its analysis in writing. That is the purpose of this opinion.

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It should be noted, at the outset, that Article 308 of the EC Treaty is the only possible legal basis for the adoption of an instrument creating a legal framework which would enable companies to be established on a model recognised throughout the internal market as a valid legal form. The proposal creates a Statute which would neither replace the existing company statutes in the law of the Member States nor harmonise them. Consequently, since the purpose of the instrument is not the approximation of laws, Article 94 of the EC Treaty would not be an appropriate legal basis for its adoption<sup>1</sup>. It should be noted that both Council Regulation No 2157/2001 of 8 October 2001 on the Statute for a European Company (SE) and Council Regulation No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE) were adopted on the basis of Article 308.

Some delegations have however pointed out that, in contrast to the two previous Regulations, the proposal has the specific feature that it does not require the company's activity to include a cross-border element as a precondition for using the Statute of a European private company.

In the opinion of the Legal Service, the absence of a requirement, for persons wishing to establish a European private company, to demonstrate the cross-border nature of their activities at the time when the company is established in accordance with this Statute does not, in itself, conflict with either Article 308 of the EC Treaty or the principle of subsidiarity.

As regards compliance with Article 308 of the EC Treaty, it need only be noted that where the Treaty has not provided the necessary powers (as is the case here), that article allows for the adoption of measures which are necessary to attain, in the course of the operation of the common market, one of the objectives of the Community.

The objectives of the Community, which are listed in Article 2 of the EC Treaty, include promoting throughout the Community a harmonious, balanced and sustainable development of economic activities.

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<sup>1</sup> See ECJ judgment of 2 May 2006, *Parliament vs Council*, ECR [2006] p. I-3733, concerning the European Cooperative Society; and opinion No 4261/90 of the Council Legal Service concerning the European Company.

It can reasonably be maintained that providing businesses with a legal framework which enables them to move their registered office or activities from one Member State to another without incurring the administrative burden involved in adopting an entirely new legal form is one of the instruments which can contribute to the development of cross-border economic activities in the internal market.

In this context, the fact that a business will not be required to include a cross-border element as a precondition for choosing the legal form of a European private company cannot, in itself, be considered an impediment to using Article 308 of the EC Treaty as the legal basis of the proposal.

As regards the application of the subsidiarity principle, it will be recalled that Article 5 of the EC Treaty only permits intervention by the Community outside the areas which fall within its exclusive competence if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States. In this case, the proposal for a Regulation aims, according to its recitals, to provide small and medium-sized enterprises, which are not large enough to be able, if they wish, to use the Statute of a European Company, with a legal framework which would be uniformly present in the company law of every Member State, given that national law would continue to apply to matters which are not governed by the Regulation or by Statutes adopted pursuant to it, as provided for by Annex I to the Regulation.

This objective is evidently better achieved by the adoption of a Community Regulation, enabling the legal framework in question to be immediately incorporated in the national law of every Member State, than by legislative action taken separately in each Member State.

This conclusion is not affected by the fact that companies wishing to use this Statute will not be required to prove that their activities include a cross-border element at the time when they are established. Since the objective is to facilitate access by small and medium-sized enterprises to activities in Member States other than their Member State of origin, requiring that they already engage in such activities even before opting for the Statute of a European private company would conflict with that objective.

On the other hand, requiring the founders of such a company to demonstrate an intention to develop their activities in a cross-border context would not constitute a constraint that would be incompatible with the objective of the Regulation, provided that the evidence required to prove this intention was not excessively burdensome and therefore a deterrent.

Lastly, although the degree of precision in the provisions of the proposed Regulation is undeniably high, especially in comparison with the previous Regulations, this observation should, in order to assess the necessity of the provisions within the meaning of Article 5 of the EC Treaty, be set against the fact that the arrangements envisaged are intended for small businesses which will not necessarily have detailed legal expertise and may, for that reason, benefit from having, in a single text, a relatively complete presentation of the rules governing their operation.

In conclusion and for these reasons, the Legal Service of the Council is minded to answer the questions raised as follows: the proposal for a Regulation is not incompatible either with Article 308 of the EC Treaty or with the principle of subsidiarity laid down in Article 5 of the EC Treaty, despite the absence of a requirement that businesses wishing to make use of the Statute of a European private company should possess a cross-border element.

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