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NOTE

From:	Presidency / General Secretariat of the Council
To:	Working Party on Company Law
No. Cion doc.:	8847/14 DRS 53 CODEC 1090
Subject:	Proposal for a Directive of the European Parliament and of the Council on single-member private limited liability companies

I. INTRODUCTION

1. The Commission's proposal, as set out in doc. 8842/14, has been extensively examined at nine occasions in the Working Party on Company Law under Greek and Italian Presidencies since April 2014. The last Working Party meeting under the Italian Presidency took place on 9 December 2014 (Attachés). At that meeting, a policy debate on the most important parts of the proposal took place in order to establish further guidance for future work.
2. The Presidency had identified a number of issues that seemed to be acceptable in principle on the basis of the latest text provided by the Presidency in doc. 16010/14:
 - a) on-line registration,
 - b) uniform template of articles of association,
 - c) minimum capital,
 - d) seat.

The orientation debate in the Working Party meeting on 9 December 2014 clearly confirmed convergence of opinions as regards these issues, whereas further technical work on the text was considered necessary. Section II of this note summarises the outcome of the debate in detail.

3. In addition, the Presidency had proposed for discussion the following outstanding issues for which a questionnaire was provided in order to steer the debate:

- e) distributions,
- f) disqualification of directors,
- g) de facto directors,
- h) the single-member's instructions.

On those issues, the discussion in the Working Party of 9 December 2014 showed a more diverse picture of opinions, but it emerged that a number of delegations considered certain provisions as not necessary to meet the objectives of the proposal or delegations showed flexibility on them. Section III presents the outcome of discussions on the questionnaire as relates to these issues.

4. The Working Party is invited to take stock of these orientations. It is understood that further drafting is needed as regards both Sections II and III of this note.

II. ISSUES WHERE AGREEMENT IN PRINCIPLE COULD BE REACHED

A. On-line registration (Articles 14 and 14a)

Doc. 16010/14 provides for on-line registration to be possible at national and cross-border level without the need of a physical presence of the person applying for registration. Such registration would be governed by the laws of the Member State of registration .

With regard to cross-border identification of the person registering the company, the physical presence would not be necessary only if the person registering the company uses the electronic identification means complying with the rules laid down in the eIDAS Regulation (Regulation (EU) No 910/2014). In addition, the laws of the Member State of registration could allow the registration authorities to accept in the cross-border context other identification means than the ones notified under the eIDAS Regulation.

In the orientation debate, all Member States accepted the principle of on-line registration of companies. A vast majority of delegations supported the principle of on-line registration without the need of a physical presence before any authority of the Member States of registration, while they found further work at technical level necessary. One delegation wanted the directive to require Member States to lay down rules on the verification of identification, whereas some other delegations were against this. The inclusion of a "non-opinion clause" in accordance with Regulation (EU) No 182/2011 (Article 5(4)(b)) could be considered.

Some delegations could not subscribe to the principle of on-line registration as it stands now in document 16010/14, one of them asking for the possibility to request physical presence in exceptional situations, and some requiring the involvement of notaries or attorneys.

B. The uniform template of articles of association (Article 11)

According to the latest Presidency proposal in doc. 16010/14, in general, articles of association would be governed by national law both as regards their form (template, bespoke) and their content. However, the founder would be able to use a uniform template of articles of association, provided by the Directive, in the on-line registration process and such choice should be honoured by the Member States of registration.

A vast majority of delegations found the overall concept as proposed in doc. 16010/14 acceptable. At the same time, these delegations saw the need to further discuss details at technical level, in particular to examine each individual item of the uniform template of association before making a final decision on the form and content of the uniform template. Some delegations still had scrutiny reservations against providing for adoption of the uniform template by implementing act as currently proposed by the Presidency. The inclusion of a "non-opinion clause" in accordance with Regulation (EU) No 182/2011 (Article 5(4)(b)) could be considered.

C. Minimum capital (Article 16)

The latest Presidency text in doc. 16010/14 lays down the general principle that the SUP could start business operations with a minimum capital of 1 euro (or equivalent in other currencies), if the founder of the SUP so decided. However, Member States may require the founders to build legal reserves.

A vast majority of delegations supported such a solution.

D. Seat (Article 10)

The latest Presidency text in doc. 16010/14 lays down as general principle that Member States may require the registered office and head office being located in the same Member State. In addition, the text clarifies that it is without prejudice to national provisions on taxation and labour law, including the provisions on the employees' participation in the management of companies. Such provisions are outside the scope of this Directive.

Most delegations spoke for this latest compromise proposal. However, some delegations could not support the proposed solution and requested that registered office and head office need to be in the same Member State.

Some other delegations questioned the need to have rules on seat in the text.

III. MAIN OUTSTANDING ISSUES

E. Distributions (Articles 18 and 19)

The majority of the delegations wished to keep these provisions in the text.

Many delegations supported keeping the provisions, but reducing the level of details provided by the Directive, while at least agreeing to the general principle that the director would be personally liable, if he/she causes insolvency due to the distributions made to the single-member. Some delegations wished to leave the regulation of distribution as such to national laws.

Some other delegations supported keeping the elements of the original proposal (balance sheet test, solvency statements and recovery of distributions). Among them, some delegations within this group found that the provisions on liability were too far-reaching. Another delegation was specifically opposed to any exception to recovery.

A small number of delegations wished to see a minimum level of provisions on distribution on the text, but were flexible as to how this could be achieved, while other delegations did not consider these provisions necessary for the achievement of the goals provided for by the Directive.

F. Disqualification of directors (Article 22)

The latest Presidency text in doc. 16010/14, while not harmonising substantive provisions on the conditions of disqualification of directors, provides a possibility for Member States of not accepting directors, or the member of the supervisory body, disqualified in the other Member States.

A number of delegations wished to maintain the possibility offered by the text in doc. 16010/14 according to which the registration authorities of an SUP would be able not to accept directors, or members of the supervisory body, disqualified in other Member States.

Many delegations agreed in principle but found that further examination of the practical implementation was needed.

Some delegations did not find it necessary to address the issue in the directive.

G. De facto directors (Article 22)

The latest Presidency text in doc. 16010/14 provides that the liability, to which normally only properly appointed directors are subject, should be extended to *de facto* directors, i.e. "Any person, directly or by an intermediary, who *de facto* exercises the function of a director by managing the SUP without having been formally appointed or acting upon expired or void appointment, shall be considered a director as regards the liabilities to which directors are subject."

The orientation debate showed that a number of delegations were attached to such provisions. Some delegations wanted to analyse the issue in more detail (one of them having a formal scrutiny reservation) whereas a number of delegations were flexible.

Many delegations did not want to have provisions on this issue in the directive.

H. The instructions from the single-member to the management (Article 23)

As regards the instructions from the single-member to the management, a number of delegations preferred maintaining the original wording as contained in the Commission proposal.

Some delegations supported the text as contained in the latest Presidency document 16010/14, extending the possibility of opposing to the instructions by the management body, not only for the reasons laid down by the law where the SUP has a registered office, but also laid down by the law where an SUP operates/has a principle place of business. A small number of delegations were flexible on the issue, with one of them underlining the added value of the provisions.

Some delegations did not consider the provisions on instructions necessary for the achievement of the goals provided for in the Directive.
