Position of the Council of the Notariats of the European Union concerning the proposal for a Directive on the single-member private limited liability company (SUP)

The Notaries of Europe have taken note of the proposal for a Directive of the European parliament and of the Council concerning single-member private limited liability companies published on 9 April 2014 and wish to contribute to the reflections underway on the question of creating single-member companies for which notaries are responsible in many countries of the European Union.

The Notaries of Europe wish to underline that this European Commission initiative presented as seeking to harmonise the rules on the formation of companies with only one member in order to make it easier to create these business aims in reality to introduce a new model of company very strongly influenced by the Anglo-Saxon system and with an ultraliberal nature characterised by the following aspects:

- Minimising controls – without a real preventive check to fight against money laundering – and preferring online registration.
- Making model articles of association available on the intranet.
- Making it possible to separate the registered office and actual place of business.
- Withdrawing any maximum and minimum capital.
- Not requiring a cross-border element.

Thus, the Notaries of Europe have focused on a number of consequences that could result from implementing the proposal for an SUP, as proposed by the Commission.

The Notaries of Europe deplore the consequences of the SUP proposal, namely:

- Risks for the economy
- A questionable choice of the law of the country of registration as applicable law
- Risks for the associate
- Incorrect legal basis
Risks for the economy

Whereas the European Commission plans to launch this initiative motivated by the need to re-launch the European economy and therefore to make it easier to create new businesses in record time and at the lowest cost, such a proposal would have a number of negative effects on the economy, namely:

(1) The lack of transparency

Even though the choice of legality check before creation of the SUP is left to the Member States, the requirement not to impose the physical presence of the founder largely restricts the possibility to carry out such a check. This lends itself to the improper use of the SUP for money laundering purposes, as it is easily possible to hide the identity of individuals behind the company.

The possibility provided by the SUP to create a series of companies without anyone being truly liable must not be neglected, as this would make it easier for entrepreneurs with bad intentions to organise their own unaccountability.

Furthermore, it seems premature to impose on the Member States in this context the mutual recognition of the identification carried out in another Member State, including in the case of electronic identification. This seems to lead to implicit recognition of the electronic signature, whereas the technical conditions to do so are not yet finalised and do not yet provide minimum legal certainty.

(2) The use of the SUP for the purposes of money laundering.

- One of the essential aspects of the proposal is the obligation imposed on the Member States to make possible the whole of the registration procedure of SUPs by electronic means and at a distance, without being able to require the physical presence of the founder in the country of registration. This removes any possibility for the Member State of registration to ask for a real identity check on the founder or beneficial owner, whereas this check is an obligation imposed by the directives on the fight against money laundering.

Moreover, it appears difficult in practice to effectively control from abroad funds brought into the SUP.

- The cost of the check would have to be borne by the business registers, which is the equivalent of transferring the cost currently borne by businesses to the tax
Furthermore, the business registers in most Member States do not have the human means nor are they used to carrying out such a check.

(3) Reduction in legal certainty brought by the reliability of the business registers.

- The absence of a real legality check (authentic instrument) carried out before any registration on the business register will reduce legal certainty at the time of registration on the business registers of the various countries. This lack of control is also true in respect of subsequent amendments to the statutes. Registration of the SUP without prior checks is a real danger in legal terms. The consequence is that the registers are unreliable.

- The ban on making registration of the SUP conditional upon obtaining certain licences or authorisations seems very dangerous in the case of certain activities – of a financial nature, for example – even more so as the business object for the SUP appears not to be conditioned. In a large number of Member States, the check on the compatibility of the business object with the actual activities envisaged and on the authorisations necessary to carry them out is conducted by the notary when the company is created. This control risks disappearing entirely. Let us imagine the possibility to create a new bank in the form of a SUP without any prior controls, in total contradiction with the wishes of the European legislator, which provided for more restrictive European legislation for financial activities.

In light of the need for transparency, prevention of money laundering and maintaining legal certainty brought by the reliability of public registers, it is necessary to leave the Member States to choose the procedure prior to access to the register. Thus, in order to avoid a special regime for the SUP, it would be preferable to use as a basis the provisions of Directive 2009/101/EC (former 68/151/EEC) and to respect, as regards organisation of the Member States, the minimum standards imposed for example under Article 11 which already provides minimum binding rules relating to the validity and legality checks for the formation of the company. The restriction of controls upon formation prejudices this acquis and, as a consequence, the organisation of the systems of national registers in many Member States. If the approach followed were different, then it would be appropriate to amend also the existing directives in the interests of legislative consistency.

Moreover, it should also be clarified that in the case of an application sent electronically, the Member States need to be able to maintain their national registration procedures and the security measures provided in Directive 2009/101/EC in order to preserve the authenticity of registration requests.
Consequences of having chosen the law of the country of registration as applicable law

1) Legal cost

If the seat of incorporation takes precedence over the actual place of business, this supposes that the law of incorporation is imposed abroad, contrary to the goal of minimal cost. This rule of supremacy implies knowledge of the law of the seat of incorporation everywhere it applies.

2) Uncertainty for employees

Allowing separation of the registered office and the actual place of business can lead to a choice of registered office that has no link with the company’s activity and is less restrictive as regards social legislation, this being to the detriment of the SUP’s employees. As an example, the choice to register in a Member State that does not have a regime of employee participation would make it easier to sidestep the rules applicable in this area in the Member State were operations take place.

The Commission proposal avoids any reference to rules applicable to employees of an SUP and in particular, to the rules relating to employee participation, thus avoiding difficult discussions that have taken place in the past.

3) Uncertainty for consumers and creditors

The proposal for a directive does not take into account sufficiently the interests of contractual partners/creditors of the company and the unique label is misleading.

- By determining that the law applicable to the SUP will be that of the country of registration, it will be easy to avoid a high level of consumer and creditor protection by choosing to register in another Member State that has more flexible protection levels.

- The SUP is a real danger for the economy: the absence of minimum capital must be compensated by measures on insolvency, as these elements need to be consistent in order to protect creditors. Protecting creditors through minimum capital is a strategy already in place in a certain number of Member States whose
validity was confirmed in the KPMG report\(^1\). It would only be necessary to find other means of protecting creditors if the idea of reducing the minimum capital is pursued.

- Even though it is already possible to conduct activities based on a company created in another Member State, this remains transparent in the course of trade (notwithstanding the unresolved difficulties and questions linked to the recognition of foreign companies), as the form of the company makes this specificity visible. Indeed, any person concluding an agreement with a ‘limited company’, for example, will easily know that it is a specific company of Anglo-Saxon law. **Through the SUP’s unique label, third parties run the risk of being misled about the law applicable to the company.** The lack of clarity regarding the law applicable to the SUP represents an economic danger (the creditor lacking information). The seat of incorporation should be specified in the name of the SUP as the SUP is subject to its law of incorporation.

- **Risks for the associate**

The system envisaged would make it possible to register online given that it is wrongly based on the secure electronic signature. However, enabling online registration without physical presence before any authority would harm the founders’ interests particularly where Member States provide for the involvement notaries in the registration process. Notaries not only ensure the identity of the founders but also provide impartial and independent advice for the benefit of all, but especially founders with less legal experience. This procedure guarantees that the founders are well informed about the considerable personal civil liability risks before entering the market. They will also receive advice on how to avoid criminal charges for delay in insolvency and how to avoid insolvency in the first place.

- **Incorrect legal basis**

The European Commission has chosen **Art. 50 TFEU** as legal basis for a proposal for a directive clearly divided into two parts. In the first part, the directive proposes to use the rules of Directive 2009/102/EC on company law concerning single-member private limited liability companies. In the second, a new type of company is introduced.

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This Commission strategy avoids the need for unanimity at the Council for its adoption (Art. 352 TFEU).

Yet, the choice of Article 50 seems inappropriate given that only paragraph 2g could serve in principle as a legal basis. Article 50.2.g provides that the European Parliament, the Council and the Commission carry out the duties devolved to them by the above provisions, such as coordinating, as far as necessary and with a view to making them equivalent, the guarantees required, in the Member States, of companies within the meaning of Article 54.2 to protect the interests of the associates and third parties.

Indeed, this proposal has no relevance to the protection of third parties in the EU. However, it concerns the creation of a new form of company exactly like the SE and the SCE. In the past, the CJEU gave its opinion on the legal basis chosen for the European cooperative and it ruled very clearly that the creation of new companies did not constitute a harmonisation instrument.

Brussels, 24 April 2014

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2 Judgement of the CJEU of 2 May 2006 in Case C-436/03