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PROGRESS REPORT

from:	Presidency
to:	Permanent Representatives Committee/Council
No. prev. doc.:	15958/08 DRS 63 SOC 698 + REV 1 (en)
No. Cion prop.:	11252/08 DRS 17
Subject:	Proposal for a Council Regulation on the statute for a European private company

1. The Commission submitted the above proposal on 27 June 2008; it is based on Article 308 of the EC Treaty. The draft Regulation forms part of a larger series of measures aimed at small and medium-sized enterprises (SMEs), the "Small Business Act for Europe".
2. The proposal for a Regulation on the statute for a European private company (hereinafter: SPE) is designed to create a new form of Community incorporation for unlisted companies, in particular small and medium-sized enterprises (SMEs). The aim of the draft is to make it easier for SMEs to set up and grow, by reducing the costs of formation and management of such companies, laying down common rules and leaving the founders considerable contractual freedom.

3. The Presidency has begun detailed discussions on the whole of the above draft Regulation. The Working Party on Company Law (hereinafter the Working Party) scrutinised the draft at nine meetings (9 July, 25 July, 4 September, 24 September, 3 October, 13 October, 27 October and 5 and 6 November).
4. To provide material for debate, the Presidency drew up four questionnaires covering all ten chapters and the annexes to the draft Regulation. Thus Member States' written comments made a useful contribution to the discussions.
5. Following the Working Party's initial consideration of the draft, the Presidency circulated a guidance note (note of 22 October 2008, 14444/08) and three revised versions of that note (note of 7 November 2008, 15291/08, note of 13 November 2008, 15562/08 and note of 20 November 2008, 15931/08).

This note and the revised versions of it were designed to identify the main problems raised by the draft statute for the SPE and to propose guidelines and options for each of the key points the statute : the relationship with national law, the cross-border element, compliance control, provisions on the company's registered office, liability of directors, employee participation and other characteristics of the SPE.

6. The Working Party considered the guidance note on three occasions (meetings on 10, 18 and 21 November, viz. the above revised notes, 15291/08, 15562/08 and 15931/08).

The Permanent Representatives Committee (Part 1) looked into three of the key points, viz.: the cross-border element, capital and employee participation on 14 November 2008, on the basis of the note of 12 November 2008 (15451/08), then, on 26 November, it considered all the issues (framework of discussions, law applicable, cross-border element, control of legality, registered office, capital, liability, employee participation and various provisions), on the basis of the note on a partial general approach of 24 November 2008 (15958/08).

7. This report is intended to brief the Competitiveness Council meeting on 1 and 2 December 2008 on progress so far on the main issues covered by the draft Regulation.
- A. Relationship with national law
8. The Commission proposal provides for a mechanism whereby the European private company would be governed principally by the Regulation, the articles of association and additionally by national law, thus leaving considerable room for contractual freedom.
 9. Many delegations wanted a broader reference to national law in the event of shortcomings in the Regulation or the articles of association. The Presidency believes that a compromise could be worked out on the basis of broader references to national law in order to avoid any legal vacuum, while maintaining contractual freedom.
- B. Cross-border element
10. The Commission proposal does not impose a requirement for a cross-border element when the company is formed, on the grounds that it would make the SPE less attractive.
 11. A number of Member States did not want a cross-border element inserted; conversely, others thought it was necessary. In particular, the lack of a cross-border element raised doubts on the part of some delegations with regard to the principle of subsidiarity. In Coreper on 26 November 2008, the Council Legal Service clarified that the lack of a cross-border element in the statute for the SPE did not constitute a legal difficulty.

12. To address these concerns, the Presidency proposed that the business object of the SPE should contain a reference to a cross-border element which might simply result from an intention to conduct cross-border business or the place of residence of the shareholders, without disappearance of this element jeopardising the existence or continued business of the SPE.

C. Control on legality

13. The Commission proposal is based on a check, at the time of registration, on the documents and particulars of the SPE, either by an administrative or judicial body or by third-party certification.
14. On the subject of the authorities responsible for these checks, some delegations wanted a reference to a notary. As to the detailed rules for the checks, some Member States favoured a reference to self-certification.

Some delegations wanted to preserve their systems of dual checks when an SPE was registered, while other Member States were determined to keep a single-check system.

15. To address these concerns, the Presidency proposed to amend the draft by inserting references to a notary and to self-certification, while keeping the idea of a single check, in line with the wishes of the majority of Member States.

D. Registered office

16. The Commission proposal allows an SPE to have its central administration or principal place of business in a Member State other than the one where it has its registered office.

17. Many Member States supported that proposal. There were some, on the other hand, who felt that the central administration and principal place of business should be situated in the Member State of the registered office.
18. The Presidency proposed a compromise solution whereby the rules for establishing the seat would be left to national law, in accordance with Community law.

E. Capital

19. The Commission proposal provides for capital of EUR 1, and a majority of Member States were in favour of that figure. Others advocated a range between EUR 1 000 and EUR 3 000. Some, on the other hand, wanted the capital to be around EUR 10 000.
20. The Presidency suggested continuing the discussions on the basis of the EUR 1 figure, while giving appropriate guarantees to SMEs, the extent of which would need to be explored further.

F. Liability and obligations of directors

21. Consensus seems to have been reached on a set of minimum principles for directors' obligations which would be common to all Member States and defined at Community level. In addition to those, obligations and liability must be governed by each Member State's national law.

G. Employee participation

22. The Commission proposal states that rules on employee participation are determined by the national law of the Member State in which the SPE is registered or, where an SPE is created by a cross-border merger, by the relevant rules in Directive 2005/56/EC on cross-border mergers. The proposal also provides for specific measures to protect the rights of employees in the event of a transfer of the SPE's registered office.
23. Different positions have been expressed as regards the rules on employee participation. In detailed discussions conducted at several Working Party meetings (3 October, 28 October and 10 November) the Presidency brought together delegations' concerns about the scope of the rules on participation.

H. Other measures

24. Other measures cover various more technical aspects of the statute for a private European company. Some points still require further work. Nevertheless, the discussions led by the Presidency have already succeeded in achieving consensus on liability for acts undertaken before registration and on audit and shareholders' rights.
25. **The Permanent Representatives Committee is asked to note that the Presidency intends to submit this report to the next meeting of the Competitiveness Council, inviting it to take note thereof and instruct its preparatory bodies to continue to seek solutions for the outstanding issues with the aim of reaching an agreement as soon as possible.**
