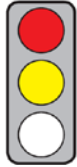


## KEY ISSUES

**Objective of the Directive:** The Commission wants to facilitate the establishment of a single-member private limited liability company ("Societas Unius Personae", SUP).

**Affected parties:** All companies and company founders.



**Pro:** Minimum share capital of one euro and no requirement to build reserves provide incentives for company formations.

**Contra:** (1) The Directive does not contain a definitive European rule. The name "SUP" contains no indication of the Member State whose national legislation applies alongside the Directive. This makes it more difficult for SUPs to inspire the confidence of their business partners.

(2) The SUP cannot be based on the competence to attain freedom of establishment but only on the flexibility clause. This requires unanimity in the Council.

## CONTENT

### Title

**Proposal COM(2014) 212** of 9 April 2014 for a **Directive** on **single-member** private limited liability companies

### Brief Summary

#### ► Context and Objective

- The diversity of national legislations makes it costly, particularly for small and medium-sized enterprises (SMEs), to establish companies in other Member States (p. 2 et seq., Recital 3).
- The Directive will facilitate the establishment of "single-member companies" – particularly as subsidiaries. For this purpose, harmonised EU rules will be brought in allowing for a new form of company called "Societas Unius Personae" (SUP). (p. 3, Recital 7)
  - A "single-member company" is a private limited liability company with one or more shares which all belong to a single shareholder (Art. 2 (1), Annex I), e.g. in Germany an "*Ein-Personen-GmbH*" or an "*Ein-Personen-AG*".
  - A SUP is a single-member company with a single share, owned by a single shareholder, which cannot be split (Art. 6 (1), Art. 15 (1)).  
The sum of the shares gives rise to the share capital. The share capital must be fully paid up on registration of the company (Art. 17 (1)).
- The Directive obliges the Member States to introduce the SUP as a new form of company (Art. 6 (1)). It simply provides the framework which must be filled in by the Member States.
- The Directive also incorporates obligations from the Directive on single-member companies (2009/102/EC) such as the obligation to keep a written record of shareholder resolutions (Art. 3 et seq.). The Directive 2009/102/EC will be repealed (Art. 29).
- A Member State can apply the rules for SUPs to all single-member companies (Recital 10).

#### ► Formation and company form of the SUP

- A SUP can be formed by (Art. 8, Art. 9)
  - the establishment of a new company by a person or by another company, or
  - conversion of an existing private limited liability company into a SUP; the SUP assumes the rights and duties existing prior to conversion.
- The abbreviation "SUP" must be added to the name of the company (Art. 7 (3)).
- The SUP has full legal personality, i.e. it exercises rights and duties (Art. 7 (1)).

#### ► Seat, Registration and Articles of Association of the SUP

- The registered office and central administration of the SUP must be in the EU but need not be in the same Member State (Art. 10, Recital 12).
  - The registered office is located in the place specified in the articles of association.
  - The central administration is located in the company's principle place of business.
- The SUP must be registered in the register of companies in the place where it has its registered office (country of registration) (Art. 14 (1)).
- As regards the areas not covered by the Directive – e.g. personal liability of the shareholder trading prior to registration, personal liability of directors who have breached their duties, details relating to the dissolution of the SUP – the law in the country of registration applies (Art. 7 (4)).

- Newly established SUPs must be able to register online so that the shareholder does not have to appear before an authority or notary (Art. 14 (3), (4), Recital 16).
  - The Commission will adopt, by way of implementing acts, uniform templates which the shareholder must use for registration (registration template) and for the articles of association (articles template) (Art. 11 (3), Art. 13 (2)). The Member States are encouraged – but not obliged – to accept templates in other official EU languages (Recital 15).
    - The registration template must be used for registration whether or not it takes place online. It contains, in particular, information on the objects of the company, identification of the shareholder, share capital and the articles of association. The registration office cannot request any additional information. It cannot make registration dependent on any licence or authorisation. (Art. 13 (1) and (2), Art. 14 (4) and (6))
    - The articles template only has to be used for online registration. It contains, in particular, details on the formation, share capital, bookkeeping and dissolution of the SUP. Where registration is not online, the articles template need not be used but the articles of association must contain the same information. (Art. 11, Art. 14 (4), Recital 19)
  - Verification of the information – e.g. as to completeness and compliance with national law – and of the identity of the shareholder takes place in accordance with national law; the Directive does not contain an obligation to effect verification. When verifying identity, the country of registration must recognise the identity documents issued by another Member State, including those issued electronically (Art. 14 (5)).
- **Activities of the Shareholder and Directors of the SUP**
- SUP organs are the Shareholders' Meeting, consisting only of the shareholder, and the "management body" comprising one or more directors (Art. 22 (1) and (3)).
  - The shareholder must conclude the most important decisions, e.g. on increases or reductions in share capital and changes to the articles of association. This right cannot be assigned to the management body. (Art. 21)
  - All decisions by the shareholder must be recorded in writing and kept for at least five years (Art. 21 (1)).
  - The management body can carry out all the activities which are not carried out by the shareholder (Art. 22 (3)).
- **Capital structure of the SUP**
- The SUP cannot own its single share. Where the share is owned by more than one person, they are regarded as one member and exercise their rights through one common representative (Art. 15).
  - The share capital (Art. 16 (1) and (5))
    - is at least one euro or a unit of the respective national currency and
    - must be stated on the SUP's publicly available means of communication, e.g. letters and website.
  - Member States cannot oblige the SUP to build up legal reserves; the SUP may, however, build up voluntary reserves (Art. 16 (4)).
  - The SUP is liable up to the amount of its equity (in particular share capital and reserves) (Art. 7).
  - The shareholder can decide to make a distribution to himself if (Art. 18 (1)-(4))
    - the majority of the management body recommends this,
    - at the end of the previous year, equity exceeded the total share capital and any reserves which cannot be distributed (balance sheet test) and
    - the SUP is able to pay its debts in the year after the distribution;
      - the management body must certify this in writing having made "full inquiry into the affairs and prospects" (solvency statement);
      - the shareholder must receive a copy of the solvency statement 15 days before the resolution on the distribution is adopted, and it must be published, e.g. on the SUP's website.
  - If the shareholder knew or, in view of the circumstances, "ought to have known" that the balance sheet test had not been passed or the solvency statement had not been issued, he will be personally liable for the resolution for a distribution and must repay the distribution (Art. 18 (5), Art. 19).
  - If a director knew or, in view of the circumstances, "ought to have known" that the balance sheet test had not been passed or the solvency statement had not been issued, he will be personally liable for recommending or "ordering" a distribution (Art. 18 (5)).
- **Dissolution or conversion of the SUP**
- The shareholder can, at any time, adopt a decision to dissolve the SUP or to convert it into another company form (Art. 21 (2) (i), (j), Art. 25 (2)).
  - The SUP must be dissolved or converted into another SUP company form if it ceases to comply with the requirements of this Directive (Art. 25 (1)).

### Statement on Subsidiarity by the Commission

Facilitating the establishment of single-member companies in other Member States can be better achieved at EU level (p. 6, Recital 28).

## Policy Context

In April 2014, the Commission submitted a package of measures on company law and corporate governance which, in addition to this Directive also contains a Directive focussing on the long-term interests of shareholders [COM(2014) 213, see [cepPolicyBrief](#)] and a recommendation on the quality of corporate governance reporting (2014/208/EU). This Directive is an alternative to the failed proposal for a Regulation on a "European Private Company (SPE)" [COM(2008) 396, see [cepAnalyse](#)] (p. 3).

## Legislative Procedure

9 April 2014	Adoption by the Commission
Open	Adoption by the European Parliament and the Council, publication in the Official Journal of the European Union, entry into force

## Options for Influencing the Political Process

Directorates General:	DG Internal Market and Services (leading)
Committees of the European Parliament:	Legal Affairs (leading), Rapporteur: TBA
Federal Ministries:	Justice (leading)
Committees of the German Bundestag:	Legal Affairs and Consumer Protection (leading); Economy and Energy; EU Affairs
Decision-making mode in the Council:	Qualified majority (rejection with 93 of 352 votes; Germany: 29 votes)

## Formalities

Legislative competence:	Art. 50 TFEU (Attaining freedom of establishment)
Form of legislative competence:	Shared competence (Art. 4 (2) TFEU)
Legislative procedure:	Art. 294 TFEU (Ordinary legislative procedure)

# ASSESSMENT

## Economic Impact Assessment

International companies set up foreign subsidiaries using a foreign form of company, inter alia, to make themselves subject to the foreign country's law on creditor protection thereby strengthening the confidence of foreign business partners which in turn makes it easier to conclude business transactions. A standard EU form of company can facilitate such formations because it reduces the number of national peculiarities with which companies have to familiarise themselves when founding foreign subsidiaries.

**The Directive does not contain a definitive European rule on SUPs.** The Directive refers to national law for the areas which are not regulated. In addition, Member States are allowed a degree of leeway when it comes to implementation, e.g. regarding verification of the shareholder's identity on registration of the SUP. Prior to concluding a transaction, **business partners must therefore find out about**, not only the European SUP rules but also the **national rules in the country where the registered office is located**.

**SUPs can only facilitate cross-border activity, and thus strengthen the internal market, if companies use this new company form. This means that it must be capable of inspiring the confidence of business partners. This is doubtful.** Firstly, business partners have to know which rules the SUP must comply with; i.e. there must be legal certainty. Secondly, these rules must be designed so that the SUP can signal its reliability to its business partners. It will be some time at least before the company form SUP is sufficiently familiar to the business partners to inspire their confidence. In particular, case law has to develop far enough to ensure legal certainty. **The name "SUP" contains no indication of the Member State whose legislation applies alongside the Directive.** Thus, with the SUP, business partners are potentially less well informed about the applicable law than in the case of national forms of company. **This results in legal uncertainty.**

The proposed possibility of separating the registered office and the central administration has pros and cons. On the one hand it facilitates the formation of subsidiaries as the parent company can register all foreign subsidiaries in the same Member State – its own or another – and at the same time set up the central administration offices in the relevant places of business. Thus it only has to learn about the special features of one national legal system, in some cases its own. On the other hand, business partners have, as a result, to familiarise themselves with foreign national legal provisions. Another consequence of separating the two offices is that the SUP can set up its registered office in the Member State which, for the SUP, has the most favourable legal provisions. In this regard, companies do not necessarily choose the country with the lowest level of national creditor protection provisions because they want to signal their reliability to their business partners.

**The duty, which is not defined in concrete terms, to recognise the identity documents of other Member States when verifying the identity of the shareholder,** facilitates, on the one hand, the formation of companies from abroad. On the other hand, there is a risk of identity fraud because the wording of the draft Directive does not exclude paper-based identity documents scanned-in by the applicant. Even the application of the Regulation on electronic identification and trust services [Regulation (EU) No 910/2014] would not be

sufficient as its requirements are inadequate (see [cepPolicyBrief](#)). The risk of identity fraud will also make it more difficult for honest SUPs to signal their reliability to business partners. This jeopardises the development of confidence in the SUP as a new form of company.

**Minimum share capital of one euro and no requirement to build reserves** in fact mean that, in the event of insolvency, the shareholder does not have to fear losing his own assets. They both **provide incentives for company formations** and allow the SUP flexibility when deciding whether to finance its investments by way of equity or borrowings. **On the other hand, it makes it more difficult to inspire the confidence of business partners** because it allows the shareholder to take higher risks which are borne by the creditors. A higher minimum share capital or an obligation to build up reserves is not necessary, however, to ensure their protection because they are free to require security. The duty to show the minimum share capital on the SUP's letters or the website improves transparency for creditors.

**The requirement of a solvency statement** for distributions builds confidence in the SUP's future creditworthiness and thus **makes it easier for SUPs to signal their reliability to creditors** because it prevents the shareholder from granting himself excessive distributions after the SUP has incurred commitments.

## Legal Assessment

### Legislative Competency

Contrary to the Commission's proposal, **the provisions on the SUP cannot be based on the competence to attain freedom of establishment** (Art. 50 TFEU).

Although the EU can harmonise national company law rules, which companies must adhere to for the protection of shareholders and third parties – particularly creditors – (Art. 50 (2) (g) TFEU), this Directive goes considerably further than that. Thus some rules relating to SUPs – e.g. the right to online registration – do not provide this protection.

Although the EU can effect the progressive abolition of restrictions on the freedom of establishment in relation to setting up subsidiaries, agencies or branches (Art. 50 (2) (f) TFEU), this is conditional upon these measures having a cross-border element because the basic right to freedom of establishment (Art. 49 TFEU) only applies in such cases. A cross-border element exists where a (natural or legal) person sets up a permanent establishment in another Member State (cf. ECJ, Case C-221/89, para. 20). A SUP, on the other hand, does not necessarily fulfil this requirement. It may also, for example, be set up by a national in their own country. Although the catalogue of possible EU measures in Art. 50 (2) TFEU is not exhaustive, this competence cannot, in view of the general restriction on the freedom of establishment, be extended to cases which do not have a cross-border element. In addition, in Art. 50 (2) (f) TFEU – at least according to the wording – only the formation of subsidiaries, agencies and branches is mentioned and not that of independent companies, e.g. start-ups.

The scope of the SUP is therefore significantly wider than the competence under Art. 50 TFEU.

Nor can **the Directive** be based on the competence to approximate laws in the internal market (Art. 114 TFEU) as it goes beyond the pure approximation of legal systems. It **can therefore be based only on the flexibility clause** (Art. 352 TFEU) as is already the case for existing European forms of company e.g. the European company (SE) [Regulation (EC) No 2157/2001]. **This requires unanimity in the Council** however.

### Subsidiarity

Unproblematic.

### Impact on German Law

In Germany, the establishment of a private limited liability company requires the assistance of a notary who also verifies the identity of the shareholder (Section 2 (1), sentence 1 Limited Company Act, GmbHG). In the case of SUPs, Germany could require only the assistance of a notary by electronic means. In addition, good faith in the Register of Companies applies in Germany (Section 15 Commercial Code, HGB) according to which the accuracy of the entries can be relied upon. This good faith will suffer if the identity of the registered shareholder has not been verified.

## Conclusion

The Directive does not contain a definitive European rule on SUPs. The name "SUP" contains no indication of the Member State whose national legislation applies alongside the Directive. This makes it more difficult for SUPs to inspire the confidence of their business partners. Minimum share capital of one euro and no requirement to build reserves provide incentives for company formations. The requirement of a solvency statement makes it easier for SUPs to signal their reliability to creditors. The provisions relating to the SUP cannot be based on the competence to attain freedom of establishment but only on the flexibility clause. This requires unanimity in the Council.