Prof. Dr. Christoph Teichmann/Andrea Fröhlich (University of Wuerzburg)

Working Paper 11/2015

(to be published in a collection of articles edited by Prof. Dr. Jorge Viera, Madrid)

How to make a Molehill out of a Mountain:

The Single-Member Company (SUP) Proposal after Negotiations in the Council

Abstract

In April 2014, the European Commission proposed a revised directive on single-member private limited liability companies. The proposal, once adopted, would repeal Directive 2009/102/EC and introduce a new single-member company type called "Societas Unius Personae" (SUP). The proposal raised a lot of controversial issues, such as on-line registration, creditor protection, real seat and internal structure of the company. The Council of the European Union fundamentally changed the proposal and, in May 2015, agreed on a compromise proposal which serves as the basis for currently ongoing debates in the European Parliament. This paper outlines the basic features of the Commissions' Proposal and the major amendments which occurred in the course of the negotiations in the Council. These amendments basically consisted in deleting most of the uniform rules which have been proposed by the Commission. As a result, "SUP" will become a European brand for a corporate legal form which is governed by national law. Having deleted almost any provision which could have helped SMEs to set up a uniform type of subsidiaries in Europe, it would be more honest to take one final step and delete the misleading denomination "SUP", too.

Content

I. Background

1. A Relaunch of the Single-Member Company Directive (2009/102/EC)

In April 2014, a proposal for a relaunch of the directive on single-member private limited liability companies caused a stir in the European landscape.[1] It is not only redrafting provisions which are already part of Directive 2009/102/EC on single-member private limited liability companies. It is adding an important new aspect to this directive: founders of single-member companies are offered uniform rules on formation and operation all over the EU (Part 2 of the proposal) and the addition of uniform abbreviation "SUP" (Societas Unius Personae) to their company names.[2] Part 2 therefore consists of rules on the formation of the company, in particular on electronic formation. It also deals with distributions and with the management of the company.

The SUP is to be a national private limited company the key issues of its establishment and functioning being harmonized.[3] This approach could be a major step in European company law since the private limited liability company so far is scarcely harmonized. The problems SMEs are facing due to the lack of any harmonized company law were already of the motivation for the proposal for a European Private Company, called Societas Privata Europaea (SPE).[4] This proposal, however, did not achieve the required unanimity in the Council and has been withdrawn by the Commission.[5] The Commission's Action Plan of 2012 proclaims that it would "continue to work on the follow-up to the SPE proposal with a view to enhancing cross-border opportunities for SMEs"[6]. In the following months, the idea

[1] Proposal for a Directive of the European Parliament and of the Council on single-member private limited liability companies, 9 April 2014, COM (2014) 212 final. For a first analysis see Ch. Teichmann, A. Fröhlich, *'Societas Unius Personae (SUP): Facilitating Cross-Border Establishment'*, 21 Maastricht Journal of European and Comparative Law (MJ) 3 (2014), p. 536 et seq. The lively discussion in Germany is summarized in a collection of articles edited by M. Lutter/J. Koch, *'Societas Unius Personae (SUP)'*, Berlin, 2015.

[2] See recital (9) of the Proposal.

[3] For an analysis of national and supranational elements of the SUP see St. Jung, '*Die Societas Unius Personae – ein Hybrid aus nationalem und europäischem Recht'*, Der Gesellschafter 6 (2014) p. 363-369; St. Jung, *' "Societas Unius Personae" – The New Corporate Element in Company Groups'*, European Business Law Review 2015, p. 645, 652 et seq.

[4] Proposal for a Council Regulation on the Statute for a European private company, 22.6.2008, COM (2008) 396 final.

[5] See P. Hommelhoff and Ch. Teichmann, '*Societas Privata Europaea (SPE) – General Report'*, in H. Hirte and Ch. Teichmann (eds.), The European Private Company – Societas Privata Europaea (SPE), 2013, p. 1, 5 et seq. The withdrawal of the SPE proposal is declared in the Annex to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Regulatory Fitness and Performance (REFIT): Results and Next Steps, COM (2013) 685 final, 2 October 2013, p. 10.

[6] Action Plan: European company law and corporate governance - a modern legal framework for more engaged shareholders and sustainable companies, 12 December 2012, COM (2012) 740 final, 4.4., p. 14.

of a harmonized single-member company emerged which has, by the way, already been considered by the Reflection Group on Company Law.[7]

The SUP-Proposal aims at facilitating the cross-border establishment and functioning of small and medium-sized companies (SMEs) which will have fewer difficulties in setting up subsidiaries in other Member States when using the SUP.[8] The various obstacles SMEs are facing in cross-border establishment have long been pointed out by business associations and academics.[9] The European Commission therefore could expect widespread support for stimulating cross-border establishment of SMEs – it did, however, face stiff opposition regarding the particular means whereby it wants to achieve this objective.

2. Key Elements of the Commission's SUP-Proposal

The key elements of the European Commission's proposal (**SUP-COM**) include the formation of the company via on-line registration without the need of the founder to be physically present before any authority of the Member State of registration. It also proposes the introduction of a uniform template for the articles of association to be adopted by the Commission as an implementing act. The share capital of an SUP must be at least 1 Euro. Distributions to the sole shareholder will be subject to a balance sheet test and a solvency test. As to internal organization, the Proposal stipulates the right of the sole shareholder to appoint and to remove the directors of the SUP. Moreover it contains the right of the sole shareholder to give instructions to the directors.

3. Negotiations in the Council and Compromise Proposals

Negotiations in the European Council were moderated by several presidencies. The first amendments to the Commission's Proposal were elaborated in two compromise proposals under the Italian Presidency, the first dating from November 2014 (**SUP-IT (1)**).[10] Taking into account reservations from national delegations, a revised text was presented in December 2014 (**SUP-IT (2)).**[11] At the end of the Italian presidency, a number of issues (on-line registration, the uniform template for the articles of association, minimum capital, seat) seemed to be acceptable for the majority of delegations whereas other issues (distributions,

[7] Report of the Reflection Group on the Future of EU Company Law, 5 April 2011, p. 66 f, available at http://ec.europa.eu/internal_market/company/docs/modern/reflectiongroup_report_en.pdf (28.4.2015).
[8] See recital (4) to (8) of the Proposal.
[9] For a detailed analysis see P.-H. Conac, *'The Societas Unius Personae (SUP): A "Passport" for Job Creation and Growth'*, European Company and Financial Law Review (ECFR) 2015, p. 139 et seq., as well as Ch. Teichmann, *Corporate Groups within the Legal Framework of the European Union: The Group-Related Aspects of the SUP Proposal and the EU Freedom of Establishment*, ECFR 2015, p. 202, 205 et seq.
[10] Doc. 14648/14, 14 November 2014.
[11] Doc. 16010/14, 1 December 2014 (not published).

disqualification of directors, de facto directors, single-member's instructions) were still subject to divergent views amongst the Member States.[12]

The Latvian Presidency drafted a new compromise proposal in March 2015 (**SUP-LV (1)**).[13] This draft contained fundamental changes in order to reach a compromise between the Member States while aiming at still preserving the additional benefit of the SUP-Proposal. Based on the first Latvian proposal, a second proposal of April 2015 only included minor changes and clarifications (**SUP-LV (2)**).[14] A further text which was discussed under the Latvian Presidency dates from 21 May 2015 (**SUP-LV (3)**).[15] At that time, the SUP-Proposal had already been discussed in fourteen sessions within the Working Group on Company Law. The amendments Member States could agree on resulted in the general approach of the Competitiveness Council of 28 May 2015 (**SUP-COUNCIL**)[16] which serves as a basis for the current debate in the European Parliament.

Below, we will discuss the most controversial issues, such as the name of the SUP (under II.), the company's seat (under III.), on-line registration (under IV.), creditor protection (under V.) and, finally, the internal organization of the SUP (under VI.).

II. Name of the SUP

1. Negotiations in the Council

Article 7 (3) SUP-COM introduced a new denomination for single-member companies: the company name of a Societas Unius Personae must be followed by the abbreviation "SUP". This common denomination shall contribute to a common identity since national company forms frequently face mistrust in other Member States due to the lack of knowledge of foreign company law.[17] The common abbreviation could be a European label in the sense of a "passport"[18] for the establishment and functioning of the SUP in different Member States.

Member States in the Council, however, disagreed on this approach. Some of them argued that the SUP, notwithstanding its European design, would still be a company governed by national law. The lack of information regarding the applicable law has also been pointed out

[12] Doc. 17018/14, 17 December 2014 (not published).
[13] Doc. 7012/15, 13 March 2015 (not published).
[14] Doc. 7626/15, 7 April 2015 (not published).
[15] Doc. 8811/15, 21 May 2015.
[16] Doc. 9050/15, 29 May 2015.
[17] The same issue was discussed with regard to the SPE. See M. Bobrzyński, K. Oplustil, *‚Formation of the European Private Company (SPE)'*, in: H. Hirte and Ch. Teichmann (Eds.), The European Private Company Societas Privata Europaea (SPE), 2013, p. 129, 134.
[18] P.-H. Conac, *'The Societas Unius Personae (SUP): A "Passport" for Job Creation and Growth'*, ECFR 2015, p. 139.

in academic literature.[19] The compromise proposal of the Italian Presidency took these concerns into account. It introduced a compulsory country abbreviation. This amendment would have allowed the creation of company names like Handel (DE) SUP, Le vin (FR) SUP, Car (UK) SUP, Fruta (ES) SUP.[20] The proposal aimed at combining information about the applicable national law and, at the same time, about the fact that the company is based on the common European framework of the SUP directive.

For some reasons which remain unclear, this approach has been given up under the Latvian Presidency. The abbreviation "SUP" remains. But the additional country abbreviation is no longer compulsory. Instead, it has turned into an option for the Member State. The state of incorporation can require SUPs to use the common national abbreviation (e.g. GmbH, SL) or a special country code (e.g. DE or ES).[21] Depending on the decision of the Member State of incorporation, third parties will either know where the SUP is registered, if there is some national abbreviation, or they will have to further enquire because the abbreviation "SUP" is not accompanied by any nationality reference. Recital 9 of the Proposal SUP-COUNCIL, however, correctly points out that the company has to indicate the location of the registered office in letters and order forms (in accordance with Art. 5 of Directive 2009/101/EC).

2. Comment

The name of the company is an important means of informing the market. It has become even more important in recent case law of the European Court of Justice: Member States must not restrict the establishment of companies incorporated in other Member States because third parties know that they are dealing with a foreign company. In the *Inspire Art* judgment, the court argued that creditors and other third parties can protect themselves since "it is clear that Inspire Art holds itself out as a company governed by the law of England and Wales and not as a Netherlands company. Its potential creditors are put on sufficient notice that it is covered

[19] W. Krauß, H. Meichelbeck, 'Die Societas Unius Personae ("SUP") – insbesondere steuerliche Aspekte, Betriebsberater 2015, p. 1562, 1564; B. Lecourt, 'La Societas Unius Personae, La nouvelle société unipersonnelle à responsabilité limitée proposée par la Commission européenne', 12 Revue des Sociétés, p. 699, 707; H. Wicke, 'Societas Unius Personae – SUP: eine äußerst wackelige Angelegenheit' 30 Zeitschrift für Wirtschaftsrecht 2014, p. 1416, 1416.

[20] Comment on Article 7 (3) SUP-IT (1). – The exact use of these examples which are given by the official comments is not recommended. They do not take into account the general function of a company name to distinguish a company from other companies in the same business. A name like "Handel (DE) SUP" would probably not be accepted by a German register. The word "Handel" means that the company is doing commerce – which is the case for thousands of companies. The name of an individual company would need to be more specific in order to distinguish the company from others with the same business.

[21] See Article 7 (3) SUP-COUNCIL.

by legislation other than that regulating the formation in the Netherlands of limited liability companies […]".[22]

In this respect it is difficult to understand why the European label "SUP" should be attached to a company which is still governed by national law. The label would have made sense if the SUP were subject to substantial harmonization by the SUP Directive.[23] But, as we will elaborate further, the opposite happened in the Council. The ambitious goal of the European Commission to create common rules for the incorporation, the internal organization and the protection of third parties has been shredded in a text which is virtually dealing with nothing more than cross-border incorporation. Once incorporated, the company will be mainly governed by national law. Many of the provisions which could have shaped a true European SUP have been deleted in the various compromise proposals. It would have been more honest to delete the European label, too, or to at least to introduce a mandatory country code indicating to third parties the particular Member State law with which they are dealing.[24]

It is true that the location of the registered office will have to be mentioned in letters and order forms, based on the Disclosure Directive (Art. 5 of Directive 2009/101/EC). But the actual compromise will lead to confusion amongst third parties. SUPs will travel around Europe with a mix of company names and abbreviations. The first impression will be misleading and only a closer look at letters and order forms will reveal the true origin of the company. What the market will soon have learned is that a company bearing the abbreviation "SUP" without any national annex should be mistrusted, since it is registered in a state which obviously has no interest in disclosing the true origin of its companies. This is not the kind of passport European SMEs have been asking for.

III. Seat and Registered Office

1. Negotiations in the Council

The Commission proposed that an SUP should have its registered office and either its central administration or its principal place of business within the Union.[25] Recital 12 of the Proposal stated that "Member States should not require the registered office of an SUP and its central

[22] ECJ, case C-167/01 (*Inspire Art*), judgment of 30 September 2003, Report of Cases 2003, I-10195, para. 135. The same statement can be found in ECJ, case C-212/97 (*Centros*), judgment of 9 March 1999, Report of Cases 1999, I-1484, para. 36.
[23] In this sense see P.-H. Conac *'The Societas Unius Personae (SUP): A "Passport" for Job Creation and Growth'*, ECFR 2015, p. 139, 152, pointing out that the SUP could be a "passport" for the cross-border function of companies.
[24] See also P.-H. Conac *'The Societas Unius Personae (SUP): A "Passport" for Job Creation and Growth'*, ECFR 2015, 139, 154/155.
[25] Article 10 SUP-COM.

administration to be in the same Member State". This approach by the Commission was criticized by some Member States as offering the opportunity to the sole shareholder to circumvent national rules on employee participation. As the SUP proposal does not cover employee participation, this issue will be governed by national law.[26] The right of employees to nominate members to the board, however, is part of company law and will thereby be governed by the law of the registered office notwithstanding the fact that the employees may be working in other Member States. An SUP registered in the UK, for instance, but having its principal place of business in Germany would not be subject to German co-determination even if all of its employees were working in Germany. It does not come as a surprise that Germany was very critical with regard to the possibility to locate the registered office and the principal place of business in different Member States.[27] Other Member States, however, felt less affected by the rule.[28]

The first compromise proposal under the Italian Presidency introduced an option allowing the Member State of registration to stipulate that the registered office and the head office should be located in its territory, as far as such a rule equally was applied to national private limited liability companies.[29] The second Italian compromise proposal added a recital that Member States should not require the managers or single members to reside in the Member State of the company's head office.[30] It should be possible to manage companies at a distance using electronic means. In the final compromise any reference to the issue of the seat and/or the registered office of the SUP has been deleted.[31] The above mentioned Recital of the second Italian compromise proposal was deleted, too. According to the general approach whereby every matter not regulated by the Directive will be governed by national law (see Art. 7 (4) SUP-COUNCIL), the matter of the seat is now subject to the national law of the state of incorporation.[32]

---

[26] Article 7 (4) SUP-COM.

[27] Federal Chamber of the States (Bundesrat), Doc. 165/2/14, p. 8; U. Seibert, *'SUP – Der Vorschlag der EU-Kommission zur Harmonisierung der Einpersonengesellschaft'*, GmbH-Rundschau, 14 (2014), p. R209, R210; R. Thannisch, *'Bedrohung für die Mitbestimmung!'*, 2 Arbeitsrecht im Betrieb (2015), p. 30-32; H. Wicke, *'Societas Unius Personae – SUP: eine äußerst wackelige Angelegenheit'*, 30 Zeitschrift für Wirtschaftsrecht (2014), p. 1416, 1417.

[28] P.-H. Conac, *'The Societas Unius Personae (SUP): A "Passport" for Job Creation and Growth'*, ECFR 2015, p. 139, 173; C. Malberti, '*The relationship between the Societas Unius Personae proposal and the acquis: Creeping Toward an Abrogation of EU Company Law?*, ECFR 2015, p. 238, 270.

[29] Article 10 (2) and Recital 12 (2) SUP-IT (1).

[30] Recital 12 (3) SUP-IT (2). See also Explanatory note regarding the main amendments to the Presidency compromise package, Doc. 16010/14, 1st December 2014, p. 3.

[31] Article 10 is missing in SUP-COUNCIL. Hence, Article 9 is directly followed by Article 11 – the numbering of articles will have to be changed at a later stage. See also Explanatory note regarding the main amendments to the Presidency compromise text, Doc. 7626/15, 7 April 2015, p. 3.

[32] See already Article 7 (4) and recital 10a SUP-IT (2), clarified in recital 10a SUP-LV (3).

2. Comment

The issue of companies locating their registered office in states without co-determination and establishing their actual place of business in Germany is a very sensitive one for German politics. Currently, more and more companies make use of this possibility to avoid the mandatory rules on co-determination.[33] Even though the German laws on co-determination are supported by the great majority of the political parties in Germany, they cannot be enforced against business people who decide to use a foreign legal entity for their business. Whatever one may think about co-determination – it is an undeniable problem of legitimacy if a Member State can no longer enforce political decisions within its own territory even though they have been duly adopted democratically.

But circumvention of co-determination rules is not an issue to be solved by the SUP-Proposal. In many Member States, even in Germany, national companies already have the freedom to locate their principal place of business outside the territory of the state of incorporation.[34] It is difficult to explain why an SUP should not have the same option. A requirement to have the place of business in the same state as the registered office could even constitute, when taken seriously, a considerable obstacle to the freedom of establishment. Any founder of an SUP who is not resident in the state where the SUP is to be registered would have to set up an establishment first before he or she could apply for registration of the SUP. This would be contrary to the idea of facilitating the incorporation and would obviously not be compatible with the aim of allowing for on-line registration without the need of being physically present in the state of incorporation.[35] As a means of protecting co-determination rights, such a requirement would be disproportionate, since co-determination (at least in Germany) does not apply below the threshold of 500 employees. There is no legitimate reason to block the start-up of a company for the only reason that it may – in the future – have more than 500 employees.

It follows that the problem of co-determination in cross-border circumstances needs an overall approach and cannot be solved in a directive on single member companies. These companies

[33] A recent study of the Hans Böckler Stiftung found out that there are approximately 100 companies with more than 500 employees (and therefore subject to co-determination) which circumvent co-determination by using foreign legal entities even though the principal place of business and the workplace of the employees is Germany („Mitbestimmungsförderung – Nr. 8 – Report Februar 2015"; retrievable at www.boeckler.de).

[34] This has been pointed out by numerous authors such as P.-H. Conac, *'The Societas Unius Personae (SUP): A "Passport" for Job Creation and Growth'*, ECFR 2015, p. 139, 173, as well as St. Harbarth, *'From SPE to SMC: the German Political Debate on the Reform of the "Small Company"'*, ECFR 2015, p. 230, 235.

[35] See also P.-H. Conac *'The Societas Unius Personae (SUP): A "Passport" for Job Creation and Growth'*, ECFR 2015, p. 139, 172, and St. Harbarth, *'From SPE to SMC: the German Political Debate on the Reform of the "Small Company"'*, ECFR 2015, p. 230, 235.

are only a small fraction of the companies affected by co-determination. The European or the German legislator should not focus on the issue of the seat or registered office but should find more appropriate ways to protect the interests of employees. The already existing framework of negotiating co-determination – when establishing a European Company or in case of a cross-border merger – would be the best solution to be applied in a cross-border context. This, however, needs further elaboration and therefore cannot be the ambition of the SUP Proposal.[36]

IV. The Formation of the SUP

The main objective of the Commission's SUP Proposal was to facilitate cross-border activities of SMEs. Setting-up wholly owned subsidiaries in many cases is the most efficient way to establish in other Member States.[37] The Commission therefore wanted to reduce costs and administrative burdens involved in setting-up subsidiaries in EU Member States.[38] This should be achieved by several means. On-line registration without the need to be physically present before any Member State's registration body; the introduction of a uniform template for registering single-member companies as well as a uniform template of articles of association for such companies; a mandatory registration period of not more than three working days. The abolition of any mandatory minimum capital (see the chapter on creditor protection V.1.a) should also be mentioned in this respect, since it may reduce obstacles for SMEs to create subsidiaries.

1. Negotiations in the Council

In the negotiations of the Council almost every aspect of the proposed SUP formation procedure faced harsh criticism from at least some Member States.

a) On-line Registration

The Commission's Proposal would require Members States to establish a registration procedure which could be completed electronically without the need of the founder to appear at any authority of the Member State of registration. Such on-line establishment should depend on the use of the uniform template of articles of association.[39] The Commission claims

[36] Closely linked to the separation of the seat is the issue of determining the applicable law which also should be solved in a more systematic way, as C. Malberti (*'The relationship between the Societas Unius Personae proposal and the acquis: Creeping Toward an Abrogation of EU Company Law?'*, ECFR 2015, p. 238, 264) correctly points out.
[37] See Ch. Teichmann, *Corporate Groups within the Legal Framework of the European Union: The Group-Related Aspects of the SUP Proposal and the EU Freedom of Establishment*, ECFR 2015, p. 202 et seq.
[38] Recital 7 SUP-COM.
[39] Article 14 (4) and 11 SUP-COM.

that the need for a founder to physically see a notary or any other authority in the Member State of registration creates additional costs and burdens for foreign founders as compared to domestic founders.[40] The Commission also drew attention to the fact that 16 Member States already offer on-line registration.[41]

Some Member States, including Germany, argued that the involvement of a notary or other professionals significantly reduces the risk of identity fraud or company hijacking.[42] Without any identity check, the reliability of the commercial register would be at stake. It would create additional transaction costs for businesses if they could no longer rely on the correctness of the commercial register.

Despite this criticism, on-line registration is still part of the Proposal.[43] The majority of Member States, at any rate, agreed on further improvements on a more technical level.[44] Member States will be allowed to request more information from the founders, in particular for tax, social, anti-money laundering and other purposes.[45] Member States may also – within the framework of their on-line registration procedures – ensure appropriate verification of identity; such rules may include the legality check via video-conference.[46] There is also a reference to the recently adopted Regulation on e-identities ("e-IDAS"). Electronic identification means, issued by a Member State and notified to the Commission in accordance with Regulation (EU) No 910/2014, should be accepted by the authorities in the Member State of registration.[47]

b) Templates for Registration and Articles of Association

The Commission's Proposal contained an exhaustive list of documents and details which the Member States might require for the registration of an SUP.[48] After registration, the SUP should be allowed to change the documents and details in accordance with the procedures specified by national law. The Commission intended to establish, by means of an

[40] SUP-COM, Explanatory Memorandum, p. 5 f.
[41] Impact Assessment accompanying the SUP-proposal, SWD (2014) 124, available at http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014SC0124&from=EN,, p. 29. These countries are Bulgaria, Denmark, Estonia, Finland, France, Ireland, Latvia, Lithuania, Malta, Poland, Portugal, Romania, Slovakia, Slovenia, Sweden and the UK.
[42] Federal Chamber of the German States (Bundesrat), Doc. 165/2/14, p. 4; P. Ries, *'Societas Unius Personae – cui bono?, Eine Anmerkung eines deutschen Registerrichters'*, Neue Zeitschrift für Gesellschaftsrecht (NZG) 2014, p. 569-570; W. Rösing, notar 5 (2014), p.149; O. Vossius, editoral, notar 6 (2014) p. 185; H. Wicke, *'Societas Unius Personae – SUP: eine äußerst wackelige Angelegenheit'* Zeitschrift für Wirtschaftsrecht 2014, p. 1414, 1415 et seq.
[43] See Article 11 (2) and Article 14 (3) SUP-COUNCIL.
[44] See Doc. 17018/14, 17 December 2014, p. 2 f. (not published).
[45] Recital 15e and Article 11 (4) SUP-COUNCIL.
[46] Recital 18 and Article 14b SUP-COUNCIL.
[47] Recital 18a, Article 13 (7) and Article 14b SUP-COUNCIL.
[48] Article 13 SUP-COM.

implementing act, a template to be used for registration.[49] This registration template should ensure a high level of uniformity and online-accessibility.[50] Any founder should be able to fill in the registration document without being physically present and without being a native speaker of the official language in the state of incorporation. The Commission also suggested that a uniform template for the SUP's articles of association in case of on-line registration be adopted. This template should cover the questions of formation, shares, share capital, organization, accounts and dissolution.[51]

This concept of a uniform registration procedure suffered considerably during negotiations in the Council. Under the Italian Presidency, a provision was introduced whereby Member States not finding it useful to have all the information or documentation listed in the Directive should be free to request less information.[52] In the final version of the Proposal, the registration formalities of the SUP are governed by national law.[53] Article 13 (2) SUP-COUNCIL still contains an exhaustive list of information the founder has to provide. Member States may only require more information if the founder wants to make individual choices going beyond the simplest set-up requirements.[54]

The idea of having a uniform template for the articles of association was also intensively discussed. At first, the majority of Member States wanted a further detailed debate on each individual item of the uniform template of articles of association.[55] Later on, all reference to the possibility of having a uniform template for the articles of association was deleted. Member States' representatives obviously did not believe in the possibility of creating such a uniform template.[56] Article 11 (3) SUP-COUNCIL simply asks Members States to ensure on-line registration with the use of a national template.

c) Verification of identity and control of legality

The establishment of rules to verify the identity of the founding member and of any other person making the registration on the member's behalf, as well as of the acceptability of the documents and other information submitted to the registration body was optional in the Commission's proposal.[57] Critics argued[58] that this approach was not in line with recent

[49] See Article 13 (2) SUP-COM.
[50] Recital 15 SUP-COM.
[51] Article 11 (2) SUP-COM.
[52] Article 13 (1) and Recital 15a SUP-IT (1); see Article 13 (3) SUP-COUNCIL.
[53] Article 13 (1) SUP-COUNCIL.
[54] Article 13 (3) SUP-COUNCIL.
[55] See Doc. 17018/14, 17 December 2014, p. 3. (not published).
[56] Explanatory note regarding the main amendments to the Presidency compromise text, Doc. 7012/15, 13 March 2015, p. 3.
[57] See Article 14 (5) SUP-COM: "Member States may lay down rules for …"

efforts to combat money laundering, which include a regime of identification rules[59], and the Disclosure Directive requiring an effective check of the constitutive instrument.[60] The compromise proposal under the Italian Presidency was therefore that Member States *shall* lay down rules for the identification and verification in the case of on-line registration.[61] Later on, however, this approach was given up and rules of verification were left to the applicable national law.[62] Under the Latvian Presidency, it was clarified that the on-line registration is without prejudice to persons or bodies assisting or checking the legality of on-line registration and verifying the identity of the founder or his representative if the registration remains completely possible without physical presence.[63] Possible rules to be established by Member States include a legality check via video-conference or other electronic means providing a real-time audio visual connection.[64] At the very last minute, the possibility was introduced that Member States may take actions "in case of genuine suspicion of fraudulent identity, including measures requiring a physical presence before an authority of a Member State on a case by case basis".[65]

As already mentioned, an identity and legality check is no longer required by Member States. Such requirements may arise from other legal provisions (such as the Disclosure Directive and Anti Money Laundering rules), but they are not expressly required by the SUP-Proposal. Nevertheless, Member States are allowed to establish national rules to ensure appropriate verification of the identity and for the verification of the legality of the registration process.[66] If Member States opt for verification rules, however, this may not affect the possibility to

---

[58] See for instance M. Beurskens, *'"Societas Unius Personae" – der Wolf im Schafspelz? – Der Vorschlage für eine Richtlinie über Gesellschaften mit beschränkter Haftung mit einem einzigen Gesellschafter –,'* GmbH-Rundschau 2014 , p. 738, 746; DAV Handelrechtsausschuss, *'DAV-Handelsrechtsausschuss: Stellungnahme zum Vorschlag für eine Richtlinie des Europäischen Parlaments und des Rats über Gesellschaften mit beschränkter Haftung mit einem einzigen Gesellschafter'*, Neue Zeitschrift für Gesellschaftsrecht 2014, p. 1372, 1377; P. Hommelhoff, *'Die Societas Unius Personae: als Konzernbaustein momentan noch unbrauchbar',* GmbH-Rundschau 2014, p. 1065, 1068 et seq; Ch. Teichmann, A. Fröhlich, *'Societas Unius Personae (SUP): Facilitating Cross-Border Establishment',* 21 MJ 3 (2014), p. 536, 543.

[59] See Proposal for a Directive of the European Parliament and of the Council on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, 5th February 2013, COM (2013) 45 final.

[60] Article 11 of the Directive 2009/101/EC of the European Parliament and of the Council of 16 September 2009 on coordination of safeguards which, for the protection of the interests of members and third parties, are required by Member States of companies within the meaning of the second paragraph of Article of the Treaty, with a view of making such safeguards equivalent, [2009] OJ L 258/11.

[61] Article 14 (5) SUP-IT (1).

[62] Explanatory note regarding the main amendments to the Presidency compromise package, Doc. 16010/14, 1st December 2014, p. 5.

[63] Recital 13a SUP-COUNCIL, first introduced by SUP-LV (2).

[64] Recital 18 SUP-COUNCIL, first introduced by SUP-LV (2) and welcomed by German Parliament (Deutscher Bundestag, Ausschuss für Recht und Verbraucherschutz, Drs. 18(6)100, 5 May 2015, p. 2; *Fechner*, Session 103 of Deutscher Bundestag, 7 May 2015, p. 9887).

[65] Article 14b (4) and recital 18b SUP-COUNCIL.

[66] Recital 18 SUP-COUNCIL.

complete the whole registration procedure on-line.[67] For this purpose identification means, issued in other Member States and notified to the Commission in accordance with Regulation (EU) No 910/2014 should be accepted by the Member State of registration; identification which is not e-IDAS compliant could be rejected.[68] For the administrative cooperation, Member States are to apply Regulation 1024/2012 on the cooperative Internal Market Information System (IMI).[69]

d) Duration of the registration procedure

In order to reduce the start-up time for new enterprises, the Commission wanted to limit the registration time to three working days.[70] This deadline should only apply to companies created *ex nihilo*, since the conversion of an existing entity to an SUP may need more time.[71]

In Germany, many authors raised doubts whether it was desirable to limit the duration in such a strict way.[72] The verification of the identity and the legality check of all the information and documents may not always be simple enough to be carried out in three working days. Under the Italian Presidency, the Council extended the period to eight working days.[73] The Committee on the Internal Market and Consumer Protection in the European Parliament pointed out that the exchange of information between Member States under the Internal Market Information System (IMI-Regulation[74]) may require even more time. In those cases, the deadline should be extended to ten working days starting from the receipt of all documents required by the Member State.[75] Nevertheless, under the Latvian Presidency, the deadline was reduced to five working days.[76] It was stressed, however, that this time limit is only to be applied from receipt of all the necessary documentation and information. In addition, the period of five working days only applies when the national template for on-line registrations

[67] Recital 18 SUP-COUNCIL.
[68] Recital 18a and 18b and Article 14b SUP-COUNCIL, first introduced by Article 14 (5a) SUP-IT (1).
[69] Regulation (EU), 1024/2012 on administrative cooperation through the Internal Market Information System and repealing Commission Directive 2008/49/49, [2012] OJ L 316/1.
[70] Article 14 (4) and Recital 16 SUP-COM.
[71] Recital 16 SUP-COM. This has already been recommended in the European Commission's Review of the Small Business Act, Communication from the Commission, Review of the "Small Business Act" for Europe, COM (2011) 78 final, 23 February 2011.
[72] Federal Chamber of the States (Bundesrat), Doc. 165/2/14, p. 16; H. Wicke, *'Societas Unius Personae – SUP: eine äußerst wackelige Angelegenheit'*, Zeitschrift für Wirtschaftsrecht 2014, p. 1414, 1416.
[73] Article 14 (4) SUP-IT (1).
[74] Regulation (EU), 1024/2012 on administrative cooperation through the Internal Market Information System and repealing Commission Directive 2008/49/49, [2012] OJ L 316/1.
[75] Draft opinion of the Committee on the Internal Market and Consumer Protection, 29 January 2015, Doc. 2014/0120 (COD), Amendment 32 Recital 16a and Amendment 88 Article 14 (4).
[76] Article 14 (3) SUP-LV (1) and SUP-COUNCIL.

is used. Furthermore, the registration deadline can be extended if there are exceptional circumstances that would make it impossible to comply with this deadline.[77]

2. Comment

It is some achievement that the idea of on-line registration somehow survived negotiations in the Council. But it is a great defect that Member States did not agree on common standards regarding the verification of identity and the legality check. Hence, the new brand "SUP" will not be supported by the expectation of quality. What is worse, the whole idea of a uniform registration procedure has been enormously watered down during the negotiations in the Council. There will be neither a uniform template for registration nor a uniform template for the articles of association. The basic idea that a uniform procedure could reduce transaction costs, because founders all over Europe know what they can expect in other Member States, has completely been destroyed. Given the diversity of languages in the European Union – Member States are only required "to endeavour" to make their templates available in other languages[78] but there is no obligation to do so – cross-border registration will be as cumbersome as it used to be. As a result, only those Member States which really want to do so, will offer a feasible procedure for cross-border registration. This does not really differ from the situation which already existed before SUP negotiations started.

V. Creditor Protection

1. Negotiations in the Council

a) Minimum Capital

According to the Commission's proposal, the SUP's share capital must be at least 1 euro or, if the euro is not the national currency, one unit of the Member States' currency.[79] The Council clarified under the Italian Presidency that the Member States are not allowed to require a share capital exceeding EUR 1.[80]

The draft opinion of the European Parliament's Committee on the Internal Market and Consumer Protection proposed a compromise taking into account different national approaches. For Member States which still have a minimum capital in their national company law, the share capital of the SUP should be at least EUR 1,000 or more at the discretion of the

[77] Article 14 (3) SUP-LV (1) and SUP-COUNCIL.
[78] Recital 15a SUP-COUNCIL.
[79] Article 16 (1) SUP-COM.
[80] Article 16 (1) s. 3 SUP-IT (1).

founding member.[81] Member States having reduced their capital requirements might provide for a lower minimum capital of the SUP.[82] They should have the possibility to keep their share capital at the low level they apply to national corporate forms.[83]

A vast majority of delegations in the Council, however, accepted the minimum capital of EUR 1.[84] Art 16 SUP-COUNCIL therefore stipulates that Member States may not require that the share capital exceeds EUR 1.

b) Contributions

The Commission's Proposal required the founder to fully pay in the consideration for the share at the moment of registration (Art. 17 (1) SUP-COM). In case of on-line registration, the contribution should be paid in cash into the bank account of the SUP (Art. 17 (2) SUP-COM).

Under the Italian Presidency, the Council specified that the consideration in cash should be paid before registration. If Member States prohibit the company from having a bank account before acquiring legal personality, they must provide for the creation of a special interim or custodian account into which the consideration is paid.[85]

Under the Latvian Presidency all these provisions have been deleted. It is no longer specified whether the contribution must be in cash or in kind and whether it has to be paid in before or after registration. The only remaining provision concerns the acceptance of the payment in a bank account within the Union. Where a Member State requires the payment of the contribution in cash, it may be paid into any credit institution to which authorization has been granted to operate within the European Union (Art. 17 SUP-COUNCIL).

c) Reserves

Some Member States, in their national company law, try to compensate for the reduction of minimum capital by imposing the duty to use a part of the profits for building up a legal

[81] Draft opinion of the Committee on the Internal Market and Consumer Protection, 29 January 2015, Doc. 2014/0120 (COD), Amendment 96.
[82] Draft opinion of the Committee on the Internal Market and Consumer Protection, 29 January 2015, Doc. 2014/0120 (COD), Amendment 97.
[83] Draft opinion of the Committee on the Internal Market and Consumer Protection, 29 January 2015, Doc. 2014/0120 (COD), Amendment 35.
[84] See Doc. 17018/14, 17 December 2014, p. 3 f. (not published).
[85] Article 17 (2) SUP-IT (1).

reserve.[86] The Commission's Proposal, in a kind of negative harmonization, prohibited the application of such legal reserve rules to the SUP.[87]

The Council's proposal under the Italian Presidency only allowed Member States to require companies in certain sectors to build up legal reserves on the grounds of public interest.[88] The revised version of December deleted this restriction to grounds of public interest. Furthermore, the provision was drafted more flexibly. Member States should simply "consider" whether a sectorial approach with regard to the obligation to build up reserves would be appropriate. They should take into account the difference in capital needed to protect creditors in the different economic sectors.[89]

The compromise proposal of the Latvian Presidency allowed Member States to require the SUP to build up legal reserves. This obligation should, however, be limited to the amount of the minimum share capital required for the national private limited liability company.[90] This provision can still be found in the final Art. 16 (4) SUP-COUNCIL: Member States may require the SUP to build up legal reserves as a percentage of the profits of the SUP. This requirement may not exceed the amount of the minimum share capital required for national private companies. The SUP will also be allowed to voluntarily build up reserves.

d) Distributions

The Commission's Proposal wants to achieve a high level of creditor protection by introducing two requirements which have to be observed by the directors when distributing assets to the single-member. Firstly, a balance sheet test will have to be satisfied, demonstrating that, after the distribution, the remaining assets of the SUP will be sufficient to fully cover its liabilities (Art. 18 (2) SUP-COM). Secondly, a solvency statement must be provided by the management body before any distribution is made (Art. 18 (3) SUP-COM). The directors will have to confirm that they made full inquiry into the affairs and prospects of the company and that they have formed the reasonable opinion that the SUP will be able to pay its debts as they fall due in the normal course of business in the year following the

[86] Such as the German *Unternehmergesellschaft (haftungsbeschränkt)*, § 5a (3) GmbH-Gesetz or the Danish Iværksætterselskabet, § 357b Selskabsloven.
[87] Article 16 (4) SUP-COM.
[88] Article 16 (4) SUP-IT (1).
[89] Recital 19b SUP-IT (2).
[90] Article 16 (4) and Recital 19b SUP-LV (1).

distribution. This provision seems to be inspired by the Dutch company law reform introducing the flex-BV in 2012.[91]

The initial SUP Proposal also contains a very wide definition of the term "distribution".: It covers "any financial benefit derived directly or indirectly from the SUP by the single-member, in relation to the single share, including any transfer of money or property. Distributions may take the form of a dividend, and may be made through a purchase or sale of property or by any other means".[92]

The compromise proposal under the Italian Presidency restricted the balance sheet test and the solvency statement to distributions in the form of a dividend.[93] Under the Latvian Presidency, the limitation on dividends for the solvency test remained in the text. The balance sheet test, however, should be applicable to any type of distribution.[94] As to the solvency statement, the time span was reduced to six months. This reduces the burden on the directors having to assess whether the SUP will be unable to pay its obligations as they become due as a result of a distribution.[95] A few weeks later, the time span was modified again. According to the Compromise Proposal of April, Member States were allowed to require a solvency statement covering a period longer than six months, but no longer than one year.[96] These rules concerning distributions are not exhaustive. Member States are allowed to lay down other provisions limiting distributions provided that they do not subject the SUP to stricter requirements than national law on private limited liability companies.[97] The SUP should continue to be an attractive option for potential founders.[98]

In the final version, however, it is fully left to the Member States to ensure "the establishment of mechanisms in national law that would prevent SUPs from being unable to pay their debts after making distributions" (Art. 18 (1) SUP-COUNCIL). What is more, a few weeks prior to

---

[91] See H.-J. de Kluiver, *'Towards a new Private Company Law. History of and Perspectives on the 2012 fundamental Overhaul of Dutch Company Law and a European Perspective on the Proposals for European Private Company (SPE and SUP)',* in A. J. Viera González and Ch. Teichmann: 'Private Company Law Reform in Europe: The Race for Flexibility', Thomsons Reuters, 2015, p. 405, 425 et seqq; V. Knapp, 'Directive on Single-Member Private Limited Liability Companies: Distributions', ECFR 2015, p. 191, 196 et seq.

[92] Article 2 (3) SUP-COM. For an analysis of the meaning « distribution » in the SUP-Directive see V. Knapp, *'Directive on Single-Member Private Limited Liability Companies: Distributions*', ECFR 2015, p. 191, 192 et seq.

[93] See Article 18 (2) and (3) SUP-IT (1): "An/The SUP shall not make a distribution in the form of a dividend…".

[94] See Article 18 (1) SUP-LV (1).

[95] Article 18 (1) b SUP-LV (1) and Explanatory note regarding the main amendments to the Presidency compromise text, Doc. 7012/15, 13 March 2015, p. 8.

[96] Article 18 (1) b and (3) SUP-LV (2).

[97] Article 18 (3) SUP-LV (2).

[98] Explanatory note regarding the main amendments to the Presidency compromise text, Doc. 7012/15, 13 March 2015, p. 8.

the agreement in the Council an apparently minor change has found its way into the draft. In Art. 18 (2) SUP-LV (3) the conjunction "and" for the balance sheet and solvency test was replaced by "and/or". In consequence, Member States are free to request either a balance sheet test or a solvency text or both. The choice of form and methods to ensure compliance with this requirement is left to Member States.[99] Consequently, the final version merely gives a list of three regulatory options (to build legal reserves, to establish balance sheet test requirements *and/or* to require a solvency statement) as possible examples for distribution rules to be imposed by national law.

2. Comments

Regulating a coherent system of creditor protection is not an easy task at all. But it is important for the reputation of a company form in the market. It is true, many Member States have abolished minimum capital requirements in order to facilitate start-up formations.[100] And the prevailing opinion acknowledges that a minimum capital requirement does not considerably improve the prospects of creditors being paid in case of insolvency.[101] But there is some empirical basis assuming that in a corporate market where different types of company forms are available – in particular one type requiring a minimum capital and another type without such requirement – the company type without minimum capital is attracting the less sustainable businesses and is, as a consequence, not enjoying the best reputation.[102] Therefore a minimum capital or some other signalling effect to creditors would have been desirable in order to attach a good reputation to the European label of the SUP.[103]

The idea of a combined balance sheet and solvency test might have been innovative as a new creditor protection approach. Hence, the creditor protection system of the Commission's version was arguably stronger than most of the national systems. Unfortunately, due to the modification in the final Council compromise, European law will offer no protection at all to the creditors of an SUP. The choice between the cumulative and alternative use of the distribution tests renders the whole section on creditor protection meaningless. Creditors are referred to the applicable national law – the SUP will not really change anything compared to

[99] Recital 19aa SUP-COUNCIL.
[100] Nowadays, 17 out of 28 Member States do not have a minimum capital requirement, see Impact Assessment (fn. 41), p. 36.
[101] See H. Eidenmüller, B. Grunewald and U. Noack, *'Minimum Capital in the System of Legal Capital'*, in M. Lutter (ed.), Legal Capital in Europe, 2006, p. 7 et seq.
[102] For a general analysis see W. Niemeier, *'What Kinds of Companies will „One-Euro-EPC" generate? – Market data and observations from the German "laboratory" '*, in H. Hirte, Ch. Teichmann (eds.), The European Private Company – Societas Privata Europaea (SPE), 2013, p. 293-347.
[103] Ch. Teichmann, A. Fröhlich, *'Societas Unius Personae (SUP): Facilitating Cross-Border Establishment'*, 21 MJ 3 (2014), p. 536, 539 et seq.

the already existing landscape. The introduction of the SUP does not even improve the situation in terms of reducing information costs by offering a standardized creditor protection regime. This, unfortunately, once more leads to the conclusion that the common "European" label "SUP" is a misleading one.

VI. Internal structure

1. Facilitating the Cross-border Management of Groups

Cross-border establishment obviously implies more than just the formation of a subsidiary in another Member State. The subsidiary has to be managed every day in cooperation between the single shareholder and the director of the company. At present, the situation is rather cumbersome for SMEs, since it is impossible for an ordinary businessman to understand the variety of different legal provisions on the internal management of private companies in 28 Member States. Due to the lack of harmonization in the area of private companies, there is no legal clarity regarding issues which may arise in a single-member company as important as the appointment and removal of a director or the right to give instructions.

It therefore was an objective of the SUP proposal to render the company type more attractive for groups of companies.[104] Contrary to public opinion, a 'group of companies' is not necessarily a large multinational business. A small craftsman operating with his domestic single-member company in his own country and establishing a single-member company abroad is creating, in the legal sense of the word, a 'group of companies'. The creation of a subsidiary is a particular method of establishing in another Member States which is expressly protected by Article 49 TFEU. Since the aim of harmonization is to facilitate the exercise of the freedom of cross-border establishment, the operation of an SUP subsidiary should be facilitated by offering clear rules as to how to manage the foreign subsidiary without having daily recourse to expensive legal advice.[105]

---

[104] Explanatory Memorandum of the Commission's Proposal, p. 8.; P. Hommelhoff, *'Die Societas Unius Personae: als Konzernbaustein momentan noch unbrauchbar'*, GmbH-Rundschau 2014, p. 1065-1075; St. Jung, *' "Societas Unius Personae" – The New Corporate Element in Company Groups'*, European Business Law Review 2015, p. 645, 660; Ch. Teichmann, '*Corporate Groups within the Legal Framework of the European Union: The Group-Related Aspects of the SUP Proposal and the EU Freedom of Establishment'*, ECFR 2015, p. 202, 227.

[105] As to the practical need for such 'enabling provisions' see Ch. Teichmann, *Corporate Groups within the Legal Framework of the European Union: The Group-Related Aspects of the SUP Proposal and the EU Freedom of Establishment*, ECFR 2015, p. 202, 224-228. The same issues have already been discussed regarding the SPE (see A. Schoenemann, Die Organisationsverfassung der Societas Privata Europeae (SPE), 2014).

Taking this into account, the Commission's Proposal contains some basic rules regarding the management of the SUP[106]. It defines the decision-making power of the single member and the power of the director to manage and to represent the company. It also covers the appointment and removal of the director by the single member and his or her right to give instructions. Recital 23 SUP-COM expressly states that "in order to facilitate the operation of groups of companies, instructions issued by the single-member to the management body should be binding."

2. Negotiations in the Council

a) Right to give instructions

Article 23 (1) SUP-COM grants to the single shareholder the right to give instructions to the management body. As a basic principle, many jurisdictions acknowledge the primacy of the single shareholder to give guidance on the management of the company – but not all Member States spell this out in their companies act. In some of the Member States a right to give instructions is part of general company law, in others it has to be stipulated in the articles of association, whereas a third group of Member States does not accept the idea of a right to give instructions at all.[107] A major stumbling block to harmonization in this area is linked to the question of whether instructions are admissible insofar as they are primarily in the interest of the group and not in the interest of the subsidiary. This could lead to conflicting director's duties in the case of an instruction received from the shareholder.[108] Should the director accept the instruction or is he bound by the sole interest of his company? And what is the interest of the company if it is part of a group of companies? The Commission's Proposal does not really solve the problem and, instead, simply states that instructions given by the single member shall not be binding for any director insofar as they violate the articles of association or the applicable law.[109]

---

[106] See Chapter 7 Article 21 to 24 SUP-COM.

[107] For a comparative overview covering eight Member States see Rodewald/Paulat, 'Führung von Gruppengesellschaften durch Gesellschafterweisungen im faktischen Konzern', 2013 GmbH-Rundschau (GmbHR), p. 519-529.

[108] See P.-H. Conac, *'Director's Duties in Groups of Companies – Legalizinig the Interest of the Group at the European Level'*, ECFR 2013, p. 194-226; Ch. Teichmann, *'Europäisches Konzernrecht: ‚Vom Schutzrecht zum Enabling Law'*, Die Aktiengesellschaft 2013, p. 184, 191-195; ibid., '*Konzernrecht und Niederlassungsfreiheit*', Zeitschrift für Unternehmens- und Gesellschaftsrecht 2014, p. 45, 49 et seqq.

[109] Article 23 (2) SUP-COM. For a critical analysis of this issue see: T. Drygala, *'What's SUP? Der Vorschlag der EU-Kommission zur Einführung einer europäischen Einpersonengesellschaft (Societas Unius Personae, SUP),* Europäische Zeitschrift für Wirtschaftsrecht 2014, p. 491, 494 et seq.; P. Hommelhoff, *'Die Societas Unius Personae: als Konzernbaustein momentan noch unbrauchbar'*, GmbH-Rundschau 2014, p. 1065, 1070-1071.

The basic question as to whether the applicable national law would allow an instruction in favour of the group interest remained unsolved. A small step in clarifying the issue was taken under the Italian Presidency[110]. Recital 23 requested the director to take into account interests other than those of the single member; among them "the interest of the SUP as opposed to the interest of the group which it could form part", the stakeholders' interest as well as environmental and employee issues. Under the Latvian Presidency, however, the right to give instructions (Article 23) was completely deleted thereby referring the issue back to national law.

b) "de facto director"

The Commission's Proposal contains a definition of the term "Director" which may cause problems for the single member. According to Article 2 (5) SUP-COM, the term "director" means "any member of the management body either formally appointed or who de facto acts as a director". The Proposal continues in Article 22 (7) SUP-COM that "any person, whose directions or instructions the directors of the company are accustomed to follow, without having been formally appointed, shall be considered a director as regards all duties and liabilities to which directors are subject". One could therefore assume that a shareholder making use of the right to give instructions (see above VI.2.a) automatically becomes a *de facto* director being subjected to the same duties and liabilities as a formally appointed director. In a cross-border context, this wide definition threatens to completely eliminate the concept of an establishment in another Member States by way of a subsidiary – which means in a company form which offers limited liability[111]. Based on the right to give instructions, however, the parent company (as a legal entity) or the sole shareholder (as a natural person), as the case may be, could easily be classified as *de facto* director of the subsidiary thereby being liable the same way as a formally appointed director.[112]

[110] Recital 23 SUP-IT (1), maintained in SUP-IT (2).

[111] The concept of establishing a limited-liability subsidiary is arguably part of the fundamental freedom of establishment granted by Articles 49 and 54 TFEU, see: W. Schön, *'Der Anspruch auf Haftungsbeschränkung im Europäischen Gesellschaftsrecht'*, in Festschrift für Peter Hommelhoff, 2012, p. 1037-1057; Ch. Teichmann, '*Konzernrecht und Niederlassungsfreiheit*', Zeitschrift für Unternehmens- und Gesellschaftsrecht 2014, p. 45, 65-70.

[112] Ch. Teichmann, A. Fröhlich, *'Societas Unius Personae (SUP): Facilitating Cross-Border Establishment'*, 21 MJ 3 (2014), p. 536, 541. For an in-depth analysis see furthermore F. Dreher, *'Der Richtlinienvorschlag über die Societas Unius Personae und seine Regelungen zur faktischen Geschäftsführung'*, Neue Zeitschrift für Gesellschaftsrecht 2014, p. 967-972.

The issue of the *de facto* (or "shadow") director[113] once again touches the problem as to how to draw the line between the duties and responsibilities of the single shareholder and the director. The British Companies Act, where the definition of director contained in the SUP-COM obviously stems from, expressly excludes the parent company from being considered as *de facto* director.[114] Thereby the influence of the sole shareholder is rightly considered to be a legitimate exercise of his or her corporate rights and not automatically a reason to become a shadow director. The formally appointed director still assumes responsibility for assessing the lawfulness of instructions and has to comply with legal obligations addressed to the company as such.

In an attempt to exclude the single member from the ambit of the provision, the Italian Presidency modified the wording of Article 22 (7) to "any director, 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"[115] thereby deleting the reference to persons whose directions or instructions the directors are accustomed to follow. The compromise proposal also took into account the above mentioned wording of the Companies Act[116] when adding a new subsection 8 to Article 22 whereby any person, including the single member, will not be liable for the sole reason of giving advice in a professional capacity or giving instructions based on Article 23.[117] Most of the Member States, however, objected to the idea of having a provision on the *de facto director* at all.[118] Consequently, the subsections of Article 22 concerned have been deleted in the compromise proposal under the Latvian Presidency.

c) Appointment and Removal of Directors

According to the Commission's Proposal, the sole shareholder will have the right to appoint and to remove the directors (Article 21 (2) (e) SUP-COM). The right to remove the director

[113] It should be noted that under English company law the expressions „de facto" and „shadow" director are not identical. The distinction is, however, eroding (see B. Hannigan, 'Company Law', 3rd edition, 2012, No. 6-25) and it is all but clear whether the SUP Proposal is taking into account these implications.
[114] Article 251 Companies Act 2006 reads as follows: „(1) In the Companies Act „shadow director", in relation to a company, means a person in accordance with whose directions or instructions the directors of the company are accustomed to act. (2) A person is not to regarded as a shadow director by reason only that the directors act on advice given by him in a professional capacity. (3) A body corporate is not to be regarded as a shadow director of any of its subsidiary companies for the purposes of Chapter 2 (general duties of directors), Chapter 4 (transactions requiring members' approval), or Chapter 6 (contract with sole member who is also a director), by reason only that the directors of the subsidiary are accustomed to act in accordance with its directions or instructions".
[115] Article 22 (7) SUP-IT (1).
[116] See above footnote 114.
[117] Article 22 (8) SUP-IT (1).
[118] Doc. 17018/14, 17 December 2014, p. 5 (not published).

will be applicable at any time and – as the Italian compromise proposal added – "for whatever reason"[119]; once removed from office, the director will be immediately deprived of the authority and power to act as a director on behalf of the SUP (Article 22 (5) SUP-COM).

Like the provision on the right to give instructions, the section on appointment and removal of directors touches a core element of the sole shareholder's power within the company. It may seem obvious and not worth mentioning that the sole shareholder has the power to decide to whom to entrust the company he has created. But in a Single Market constructed upon the national law of 28 Member States, it is never superfluous to mention the obvious. And it is, as a matter of fact, not at all obvious for a foreign businessperson how to find out the state of play in a particular Member State without having recourse to expensive legal advice.[120]

The Council nevertheless – without giving any understandable reasons – deprived the SUP of this very last element of uniformity and deleted the provision on the removal of directors. The explanatory notes[121] refer to Recital 22 SUP-LV (1). When reading Recital 22 SUP-LV (1), however, no explanation at all can be found regarding the deletion of the provision. The recital only deals with the secondary issue as to how the fact that the director has been removed will be disclosed. The primary question, whether the sole shareholder can remove the director at any time and for whatever reason, is not mentioned at all.

2. Comment

The provisions on internal organization as proposed by the European Commission in its SUP Proposal could have marked a major step for SMEs setting up subsidiaries in other Member States. It is not sufficient to regulate the formation of a company and to leave SMEs left in the dark when it comes to management of the subsidiary. Unfortunately, this is what the Council Proposal does. The SUP as it stands now is no longer a harmonized company form. Member States could not even agree on basic issues such as the right of the single member to appoint and dismiss directors or to issue instructions to him. Instead, the internal organization of the SUP will be completely governed by national law.

[119] Article 22 (5) SUP-IT (1), maintained in SUP-IT (2).
[120] For the sake of illustration, the authors of this article have to admit that, having read the relevant legal provisions of the Irish Companies Act for several times, they are still not able to answer the simple question whether it is legally possible to remove a director at any time and without reason (cf. Articles 142 and 182 Irish Companies Act).
[121] See SUP-LV (1), page 8.

VII. Conclusion

According to an English proverb, people should not try to make a mountain out of a molehill. The ongoing negotiations on the SUP serve as an example that the opposite direction is possible, too: to make a molehill out of a mountain. The SUP started as an ambitious project intended to facilitate cross-border establishment for SMEs. If one tries, however, to explain what "SUP" means after negotiations in the Council have concluded, the best explanation would be to point out what "SUP" does not mean. It does not mean that SMEs can expect a uniform formation procedure; the SUP does not even offer a conclusive list of the relevant documentation for registration; it does not offer a uniform template for the articles of association; there is no harmonization at all for the internal organization of the company; there is no uniform rule for distributions.

The only feature which survived is the obligation of the Member States to allow for on-line registration. But even in this respect there are no uniform rules. It is up to the Member States to require more or less information, to accept the documents which are listed in the Directive or to invent additional requirements. Consequently, SMEs will be caught in 28 different systems of on-line registration.

To cut the long story short. The "SUP" is a *European* brand for a corporate legal form which is governed by *national* law. Taking this into account it sounds logical that one of the rare provisions which has not been deleted but rather added by the Council stipulates the following: Member States are requested to provide up-to-date, concise and user-friendly information about the applicable *national* law.[122] Having thereby successfully deleted almost any provision which could have helped SMEs to set up a uniform type of subsidiaries in Europe, the European legislator should take one last step and delete the misleading denomination "SUP". The directive which is currently debated between the European Parliament and the Council introduces the possibility to register companies on-line. Nothing more and nothing less.

[122] Article 12 (1) and Recital 15c SUP-LV (2). To this new approach St. Jung, *'"Societas Unius Personae" – The New Corporate Element in Company Groups'*, European Business Law Review 2015, p. 645, 687.