The Societas Unius Personae (SUP):  
A “Passport” for Job Creation and Growth

by

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The proposal by the European Commission of a directive on single-member private limited liability companies of 9 April 2014 is designed to facilitate cross-border activities of enterprises, especially small and medium-sized enterprises (SMEs) by requesting Member States to provide a company form called the Societas Unius Personae (SUP) that would be set up online and would follow harmonised rules on key issues. Therefore, the SUP is a “passport” to facilitate the establishment of companies in other Member States. By facilitating exports and activities in other Member States, the SUP would contribute to job creation and growth in Europe. It would also be an internal “passport” as it would facilitate the creation of companies within Member States since it liberalises the rules on capital and forces online creation. The SUP would also significantly facilitate the cross-border functioning of groups, exactly like the Societas Privata Europea (SPE) – which the SUP replaces – was designed to achieve. However, the approach adopted by the Commission is innovative as it does not seek to create a supranational company like the SPE. Criticism of the SUP focuses on its innovative legal basis and content. However, these criticisms, even while addressing valid concerns, are exaggerated or simply unfounded. For example, critics of the option to separate the statutory seat from the real seat is understandable, at least from a political perspective, and has been addressed. The November amended version in the Council has introduced the right for the Member States to impose the real seat. This should help alleviate concerns that the SUP would be used to circumvent co-determination.

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I. Introduction

The proposal by the European Commission of a directive on single-member private limited liability companies of 9 April 2014 is designed to facilitate cross-border activities of enterprises, especially small and medium-sized enterprises (SMEs) by requesting Member States to provide a national company law form that would be set up online and would follow harmonised rules on key issues.¹ In order to be easily distinguished from the existing private limited liability companies in Member States law, which would remain non-harmonized, this new partially-harmonized company form would have a European-wide abbreviation: SUP (Societas Unius Personae). Therefore, the directive proposal could as well have been called a proposal on the Societas Unius Personae (SUP) if it had also not included the limited number of rules imposed by the twelfth company law directive of 1989 on all single-member private limited-liability companies.²

The directive proposal originates from the willingness of the European Commission (hereafter “the Commission”) to unlock the potential of the single market for SMEs. Currently, as stated by the very detailed and well argued Impact Assessment accompanying the proposal: “… the SME participation in the Internal Market is low”.³ For instance, according to the report on Internationalisation of European SMEs, only around 2% of SMEs establish companies abroad⁴ (in the form of a subsidiary, branch or joint-venture). This results in investments abroad by only approximately 500,000 companies out of a potential pool of 20.7 million SMEs. Among all of the companies that invest abroad, micro-enterprises⁵ constitute 2%, small enterprises 6%,⁶ and

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⁵ Micro-enterprises have below ten employees and have a turnover or balance sheet total below or equal to € 2 million.
⁶ Small enterprises have below fifty employees and have a turnover or balance sheet total below or equal to € 10 million.
medium-sized enterprises 16%. In addition, most of the companies limit their investment to a single country (71%). When only 2% of European SMEs are establishing companies in other Member States, this indicates that there are strong barriers to trade and entry that need to be levelled in order to contribute to the realisation of the single market. Only the European legislator can – and it should! – achieve this goal.

The Commission already tried to address this problem when in 2008 it proposed the Societas Privata Europaea (SPE). The SPE, like the proposed SUP, was designed to overcome barriers for SMEs wanting to do business abroad. The Explanatory Memorandum to the SPE stated that, “[s]mall and medium-sized enterprises (SMEs) account for more than 99% of companies in the European Union but only 8% of them engage in cross-border trade and 5% have subsidiaries or joint ventures abroad. While it has become easier in recent years to set up businesses across the EU, more needs to be done to improve the access of SMEs to the Single Market, facilitate their growth and unlock their business potential”. The SPE concept was initially supported by both France and Germany, which is not surprising as they are export-oriented economies.

However, the SPE faced difficult challenges in the Council. The possibility of having a company with only a single euro as minimum capital proved to be controversial with many of the Member States that did not have such a system at the time. These Member States wrongly feared that such a nominal amount would reduce creditor protection. Because the SPE could have several shareholders, the SPE also faced technical difficulties because a company form with multiple shareholders also meant that the rights of minority shareholders had to be agreed on, despite widely divergent opinions between individual Member States on that issue. Further, the SPE faced some fundamental opposition. Some Member States, including the United Kingdom (UK), for example, do not support the idea of the so-called “29th company law regime” whereby company forms are created by EU law and constitute a distinct company law regime on a supranational basis. Further, the separation between the real seat and the statutory seat proved very controversial as many Member States apply the real seat doctrine and could not accept a company form which would be an exception on such a major issue in their company law. Some Members States also feared that it would be too easy to move the seat from one country to

7 Medium-sized enterprises have below two hundred and fifty employees and a turnover below or equal to €50 million or balance sheet total below or equal to €43 million.
9 Final report, supra n. 5.
another since the SPE would receive its legal personality from the European legislator. Finally, the issue of co-determination proved fatal as German labour unions feared that the SPE could be used to escape the Mitbestimmung system.  

The SPE would have been an EU company form. It had to be a regulation and not a directive and its adoption required a unanimous vote in the Council. This meant that each Member State had a veto right. Therefore, there was no strong incentive to negotiate and the oppositions between Member States and the inability of Germany to agree on a compromise on co-determination ground the negotiations to a halt.

However, the idea to help SMEs establish cross-border was not given up. As the Commission was facing those difficulties in the area of company law, it set up in December 2010 a Reflection Group on the future of EU company law to provide a report for a conference to be held in Brussels in May 2011. The Reflection Group published a report that suggested an alternative approach to the SPE in order to facilitate the establishment and functioning of cross border groups. It included a proposal that Member States should make available a harmonised single-member private limited liability company limited to harmonised rules on key issues regarding the formation, operation and governance of such companies. The report proposed that with respect to SMEs that are part of a group of companies in Europe, “it is proposed that a new EU Directive or an amended 12th Company Law Directive require EU Member States to provide for a simplified company template, which would allow single-member companies, both individual entrepreneurs and holding companies, to save on transaction costs and unnecessary formalities. In as far as the single-member company is part of a group of companies appropriate rules should be developed to safeguard the interests of the subsidiary and its stakeholders, specifically its creditors.”

There were several advantages to this alternative approach. First, there would be no need to harmonise rules on minority shareholder protection since the proposed form would be a single-member private limited company. The rules that would need harmonisation would be limited to key elements, reducing the risk of having to find a compromise among Member States. Second, it would not be an EU company form, which should remove the opposition of some Member States to a “29th company law regime”. As an added benefit, since it would be a directive, a qualified majority would be required in the Council instead of unanimity. Finally, the proposal should be easier to adopt since the

13 Article 352 of the Treaty on the Functioning of the European Union (TFUE).
12th company law directive of 1989 already provided some rules for single-member private limited liability companies, and, therefore, Member States had already accepted the idea that the European legislator could intervene in this area since they already had accepted some degree of harmonisation. The report of the Reflection Group suggested either adopting a new directive or simply amending the 12th company law directive of 1989.15

In May 2012, the Commission then organised a consultation on the future of European company law. The consultation showed a vast majority supporting “alternatives to the SPE Statute, in particular supporting an instrument labelling existing national company law forms that meet a number of pre-defined harmonised requirements. The second most favoured option was the continuation of work on the current SPE proposal”.16 The support was less for the creation of a simplified single-member company charter. This lessened support can be explained by the fact that those supporting the SPE did not want to support an alternative approach which would have meant the withdrawal of the SPE. Indeed, the two approaches were alternatives. However, since the negotiations on the SPE were in great difficulties, the idea of the SUP became the obvious alternative.

In its December 2012 Action Plan on European company law and corporate governance, the Commission noted that it would “continue to work on the follow-up to the SPE proposal with a view to enhancing cross-border opportunities for SMEs”.17 The Action Plan implicitly admitted that the SPE would not be adopted and the proposal was officially removed in 2013 as part of the Regulatory Fitness and Performance Exercise (REFIT).18 However, because the SPE had been strongly supported by business associations, the Commission announced at the same time that it would come up with a “proposal of an alternative measure designed to address at least some of the problems addressed by the SPE”. This led to the publication of the proposal of directive on single-member private limited liability companies of 9 April 2014 which

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15 Report, supra n. 15, at 66.
included the SUP. Some business associations in France and in Germany\textsuperscript{19} as well as some authors\textsuperscript{20} and German politicians\textsuperscript{21} have rightly regretted giving up on the SPE and expressed “SPEstalgie” in even requesting that the Commission reintroduce the proposal. However, the negotiations failed in the Council. Therefore, the SUP is the only alternative to the SPE in the short and medium term. In a joint article, Peter Hommelhoff and Christoph Teichmann have very correctly described the SUP as the revival (Wiederbelebung) of the SPE under a simplified and national form.\textsuperscript{22} Since most often a subsidiary is a wholly owned company owned either by a natural person, an SME or a bigger business, then the SUP would achieve much of what the SPE was designed
to do.

Because the main goal of the SUP is to facilitate the creation of companies by SMEs, especially cross-border, it can be described as a “passport” for creating jobs and growth in Europe (II). It is also a secure and targeted instrument because the proposal of directive includes protections for third parties and is limited to company law rules. Therefore, it can be described also as a secure company law only passport (III).

\textbf{II. A passport for the cross-border establishment and functioning of companies}

The directive proposal is designed to facilitate the establishment of single-member companies under the form of an SUP (1) and also the functioning of those companies (2).

\textbf{1. A passport for the establishment of companies}

The main goal of the SUP proposal is to facilitate the establishment of SMEs in other Member States (a). However, the directive proposal contains certain rules which should also help to create single-member companies in a purely national context (b).

\begin{itemize}
\item \textsuperscript{19} See, BDA, BDI, DIHK, Gemeinsame Stellungnahme zum Vorschlag für eine Richtlinie über Gesellschaften mit beschränkter Haftung mit einem einzigen Gesellschafter, COM(2014) 212 final.
\item \textsuperscript{21} Harbarth, \textit{supra} n. 13 at 234.
\item \textsuperscript{22} P. Hommelhoff, C. Teichmann, \textit{Die Wiederbelebung der SPE}, GmbHR 2014, 177–86.
\end{itemize}
a. Passport for the establishment of subsidiaries outside Member States

The SUP proposal allows for electronic incorporation without the founding member needing to appear physically before any authority in the Member State of registration, even if that Member State is different from the Member State of founder’s residence. The list of required documents would also be harmonised and the founder could use a single template. These measures would remove three distinct difficulties that companies and individuals wishing to establish a subsidiary in another Member State currently face (i). The main beneficiaries from this reform would not be large groups of companies, but SMEs, especially the small ones (ii).

i. The obstacles to the establishment of subsidiaries outside Member States

The first difficulty faced by founders is procedural. Entrepreneurs and even lawyers in one Member State are usually not aware of the procedures and rules applying to the creation of a private limited liability company in another Member State even if the Member State is very close to the one in which the founder lives. For instance, one esoteric requirement at the moment in at least one Member State is that national person single shareholders must provide their maiden name and/or their mother’s full and maiden name. By harmonising the incorporation process, the SUP proposal would allow entrepreneurs in one Member State to easily determine the applicable formation process, as it would be the same as in their home country.

The second obstacle is the language barrier. Not only do procedures differ, but it might also be difficult for an entrepreneur or a lawyer in one Member State to even understand the procedures since they are usually presented in the language of the other Member State. Some specialised websites offer to help create companies, even offering translation into English, but all of this help comes at a cost. Imposing English into the incorporation process in all Member States, in addition to the national official languages, although very useful, would not be a perfect solution since many entrepreneurs do not speak English, although they could speak one or several other languages. In addition, there is no reason to impose English onto an Italian company wanting to establish itself in Austria or vice-versa. Finally, Member States are unlikely to accept English being imposed. The SUP proposal would overcome this language obstacle because the procedure would be identical in all Member States, making the language differences less relevant. The shareholder would

23 For a more detailed presentation of the formation of the SUP and the single template, see, H.-J. de Kluiver, SUP – a new way forward to facilitate business in the EU 12 ECFR 2 (2015) at 177.
only need to fill out information about their company on a standardized form, a form that is easy to complete because it has the same content and arrangement as the standardized form in the shareholder’s home country.

The third obstacle is the physical barrier. Entrepreneurs and SME lawyers may not know where and how to establish a private limited liability company in another Member State. Some specializes websites again offer online services, but again they come at a cost. In addition, there will usually be a need for the entrepreneur to move across the border in order to appear in person where he might face, again, the language problem.

The argument has been raised that even with the SUP the founder will still have to physically go into the other Member State, removing the advantage and ease of facilitation that comes with an online incorporation process. However, the issue is to not prevent the entrepreneur from moving physically in the Member State where he or she wants to establish a subsidiary. He will have to do so to rent a location for his shop, for example, or to hire a local employee. This implies that he or she can speak the language of the other Member State or a third language spoken by all persons involved in the process of creating a shop. The real issue is about avoiding having to move cross-border to create the company itself as he would face obstacles such as not knowing where to go in the first place to incorporate the company.

These obstacles are not as important for larger companies who can pay for the services of large international or national law firms and that have locations already in several Member States. However, these services are very costly and are not even always available in every territory of the Member State. These large law firms are usually to be found in capitals or major industrial cities in each Member State. Therefore, the physical presence requirement is a real barrier for SMEs and even more for very small SMEs.

Facilitating the incorporation process does not mean that establishing an SUP should be done without appropriate legal advice, both during incorporation and after. It rather means that, for instance, a German lawyer or a German notary will be able to know how to create for his German client an SUP in another Member State, such as France or Poland. The SUP would not reduce the need for local lawyers or notaries as such but would instead reduce the need to meet physically with foreign lawyers or notaries in order to incorporate the company. This would be a considerable improvement for SMEs compared to the current situation. The entrepreneur would not be obligated to physically travel to the other Member States and would simply need to go to his local lawyer or notary for advice if he wants. The latter could then create the SUP online and could also provide advice on the SUP. Compared to the current situation, the cost and expertise would be relocated, at least partially, to the Member State where the single-member is incorporated or lives. A
German lawyer would be able to provide some legal advice on other Member States.

The hurdles that the SUP tries to overcome are real and should not be underestimated. An academic field experiment published in 2009 showed that, despite the existence of the 11th directive of 1989, it remains costly and impractical to establish branches in other Member States. The study noted that “Once the document translation and certification hurdles have been overcome, the ease of branching depends on national idiosyncrasies”. Establishing branch offices is made more cumbersome and costly by: requiring, de jure or de facto, the compulsory intervention of a public notary, as in Italy or Germany; by insisting on evidence that the branch really exists (a requirement that is absent from those the Eleventh Directive allows Member States to impose), as in Austria; or by meddling with the contents of the objects clause, as in various countries. In Sweden, the requirement to appoint an auditor for the branch places an important extra cost burden on branching (although, to be sure, a similar requirement also exists for domestic companies), while in Italy, Hungary and Poland the requirement to execute a company resolution setting up the branch causes additional hurdles because this resolution is not part of the standard packet of documents provided by incorporation agents. There is no reason why the situation should be different for establishing a subsidiary in another Member State.


ii. The beneficiaries of the establishment of subsidiaries outside Member States

The immediate and biggest beneficiaries of the SUP would be Member States with a large export-oriented SME sector. This is, for example, the case in Germany, where the Mittelstand is quite important. The same can also be said of smaller Member States, including Austria, Denmark or Belgium that also have large SME sectors. In general, all Member States would benefit from the SUP as it would make it easier for their SMEs to establish a subsidiary abroad. Of course, having the possibility to create a subsidiary in another Member State does not mean that SMEs will actually do it nor does it promise that they will create jobs in the process. However, it is certainly useful to create

27 Harbarth, supra n. 13 at 232.
a legal environment where it is easy for SMEs to do it if they wish to develop themselves abroad. The probabilities are also significant that such expansion will lead to job creation.

Other probable beneficiaries of the SUP would be micro-enterprises located close to a border that want to setup shop in the neighbouring Member State. An SUP would make it much easier for them to cross the border or the river. One example could be a clockmaker from the Black Forest (Schwarzwälder Uhrmacher) establishing a subsidiary in Strasbourg to sell clocks.\(^{28}\) With the SUP, the burdens of the language and legal barriers would be minimized. Another example could be hairdressers from Strasbourg opening a new location in Kiel, or those from Flensburg opening in Danish Padborg or from Frankfurt-Oder opening in Polish Kunowice. There are many other geographic areas in Europe where economic activity spreads or has the potential to spread across borders despite different legal rules, not to mention the language differences. For instance, the area in and around Luxembourg with three closely neighbouring states could also benefit significantly from the SUP.

The SUP is designed to help cross-border establishment of companies. However, the proposal also contains rules which would also facilitate the creation of SUPs in several Member States.

\[b. \text{Passport for the establishment of companies within the Member States}\]

The proposal of SUP should also bring significant improvement in many Member States. One improvement would be the suppression of the minimum capital (i) and the other, affecting even more Member States, is the speeding-up of the incorporation process (ii). Those improvements should also have a spill-over effect on other types of companies since it is doubtful that a Member State would limit those benefits to the SUP only.

\[i. \text{The suppression of the minimum capital}\]

The SUP proposal provides that the share capital shall be at least 1 EUR or the equivalent minimum unit of that Member States’ currency when it is not the euro.\(^{29}\) Therefore, the SUP imposes on all Member States who have not done so already to introduce a 1 EUR company. In addition to the fact that the minimum legal capital has not proven to be an effective tool to protect cred-


\(^{29}\) For a more developed analysis, see J. L. Hansen, The SUP proposal – Registration and capital (Article 13–17), 12 ECFR 2 (2015) at 181.
itors, it can even be an obstacle to creating companies and the level of the minimum capital is unjustifiably arbitrary. For instance, there is no need for a large level of capital if the SUP is a small service company. Also, start-ups can be created at a founder’s parents’ house with a computer and have no need for large investments. For these companies, the requirement to have a minimum capital is not necessary and can be a huge hurdle.

The trend in Europe towards a 1 EUR company has been very strong. France suppressed the minimum capital for private limited liability companies (Sociétés à responsabilité limitée or SARL) in 2003 and for the simplified public limited companies (Sociétés par actions simplifiée or SAS) in 2008. These reforms apply whether the shareholder is a natural or a legal person.

This trend has been encouraged through regulatory competition among Member States made possible by the case law of the European Court of Justice (ECJ). As a consequence, for instance, Germany introduced the “entrepreneur company” (Unternehmergesellschaft or UG) in 2008 requiring only 1 EUR capital to combat the influx of UK Limiteds with a real seat in Germany. The UG has been a great success. Belgium also reacted to competition from the UK Limiteds, creating in 2010 a sub-type of private limited liability company with no minimum capital for natural persons only (Société privée à responsabilité limitée Starter or SPRL-S). In 2012, as part of the creation of the Flex-BV (besloten vennootschappen met beperkte aansprakelijkheid or BV), the Netherlands eliminated the previously required 18,500 EUR minimum capital for its private limited liability company. Other Member States, including Hungary (2007), Poland (2009), Denmark (2010) and Sweden (2010), while not suppressing the minimum capital, significantly reduced the amount required in the last years.

The trend towards the suppression of minimum capital in Member States has even accelerated since 2008, especially in the countries most affected by the financial crisis. Those reforms have often been targeted at natural persons. For instance, in 2012, Italy introduced a private limited liability company subtype (società a responsabilità limitata or Srl) with a minimum capital of 1 EUR (Srl


semplificata), a maximum allowable capital of 9,999.99 EUR\textsuperscript{33} with the requirement that the company be formed only by natural persons that use a compulsory template.\textsuperscript{34} The Italian legislature suppressed minimum capital requirements in all private limited liability companies in 2013 provided that contributions are fully paid and in cash.\textsuperscript{35} Portugal introduced the private limited liability company (Sociedade por Quotas) with no minimum capital in 2011.\textsuperscript{36} In 2012, Greece also introduced a private limited liability company subtype (IKE) with no minimum capital (instead of the previously required 4,500 EUR).\textsuperscript{37} Finally, in 2013, Spain also introduced a private limited liability company subtype (Sociedad Limitada de Formación Sucesiva or SLFS), also limited to natural persons, without any minimum capital required instead of the 3,000 EUR minimum capital previously necessary.\textsuperscript{38}

At the time when the SUP proposal was published there were only eleven Member States that had a capital requirement above 1 EUR or equivalent in local currency. All other Member States had abolished the minimum capital for private limited liability companies at least for natural persons and sometimes for both natural and legal persons.

Since the publication of the SUP proposal, the trend has continued unabated. For instance, Poland announced in May 2014 that it would suppress the minimum capital in private limited liability companies. Luxembourg introduced a bill in February 2015 to introduce its own private limited liability company subtype (Société à responsabilité limitée simplifiée or SARL-S) with a minimum capital of 1 EUR and a maximum of 12,394.68 EUR (the statutory minimum share capital requirement for an SARL).\textsuperscript{39}

Therefore, the proposal on the SUP is because it accelerates a positive trend towards the suppression of the minimum capital in those Member States that still impose it. In those Member States that introduced it, suppression has had positive effects on company creation. Therefore, the Commission is showing

\textsuperscript{33} Art. 2463\textit{bis}, Italian Civil Code.
\textsuperscript{34} Issued by Italian Ministry of Justice’s decree (\textit{decreto ministeriale}) nr. 138 of 23 June 2012.
\textsuperscript{35} Article 2463, Italian Civil Code.
\textsuperscript{36} Art. 219/1 and 219/3, Portuguese Code of commercial companies. Decreto-Lei n/ 33/2011 of 7 March 2011.
\textsuperscript{37} Article 43 par. 3 a of Law 4072/2012.
\textsuperscript{38} Ley 14/2013, de 27 de septiembre, de apoyo a los emprendedores y su internacionalización.
\textsuperscript{39} Projet de loi ayant pour objet d’instituer la société à responsabilité limitée simplifiée et portant modification de 1° la loi modifiée du 10 août 1915 concernant les sociétés commerciales ; et 2° la loi modifiée du 19 décembre 2002 concernant le registre de commerce et des sociétés ainsi que la comptabilité et les comptes annuels des entreprises, n°6777, 2 February 2015.
the way and forcing the remaining Member States to adhere to this modernisation movement and, by doing so, the Commission is helping the economy to create jobs and growth in Europe.

### ii. The speeding-up of the incorporation process

The SUP’s online incorporation process, on the basis of a limited list of documents and information, would also improve the European competitiveness as a whole, as it would speed up the registration process. The 2010 Council’s “Action Plan for a Small Business Act for Europe” had asked Member States to bring down start-up times of companies to 3 working days.\(^{40}\) Therefore, the SUP proposal integrates this request. Currently, the situation in Europe is mixed. Although some Member States allow for direct online registration by the founder, the general situation is not very favourable. According to the SUP Impact Assessment, “in 2012 the average time of starting up a private limited liability company was 5.4 days\(^{41}\), ranging from a few hours in case of an electronic registration up to more than 5 days in case of a paper one.”\(^{42}\) It takes in the EU an average of 12.9 days to set up a business, with Malta requiring the highest number of days at thirty-nine followed by Poland and Austria. Although some Member States are particularly effective, such as Estonia, for instance, with a ground breaking 18 minutes,\(^{43}\) the EU on average is lagging behind internationally as evidenced by the World Bank’s *Doing Business 2015: Going Beyond Efficiency* report.\(^{44}\)

As noted by the Commission in its Impact Assessment, “[b]eing able to directly register online would benefit domestic company founders (in [Member States] which did not provide for online registration so far) by making the procedure simpler, quicker and less costly”.\(^{45}\)

Therefore, the harmonised registration procedure proposed by the SUP should increase competitiveness of the European economy as a whole and force those Member States who have not modernized their incorporation process enough to do so. It is certainly one of the Commission goals to force

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\(^{42}\) Impact Assessment, *supra* n. 4 at 13.


\(^{45}\) Impact Assessment, *supra* n. 4 at 27.
Member States to modernise their company law. The Commission has replaced regulatory competition by a race to modernisation.

Although the proposal is targeted at facilitating the establishment of companies, it is also designed to facilitate the cross-border functioning of companies by harmonising rules.

2. A passport for the cross-border functioning of companies

The SUP is also a passport for the functioning of companies. It relates to the SPE which was also designed to offer SMEs a legal instrument facilitating their cross-border activities, which would be simple, flexible and uniform in all Member States. Therefore, the SUP proposal includes key provisions targeted at the functioning of the SUP (b). However, their existence has lead to a debate on the legal basis of the directive (a).

a. The legal basis

The SUP proposal is based on Article 50 of the Treaty on the Functioning of the European Union (TFEU) which is the legal basis for the EU competence to act in the area of company law. More precisely, Article 50(1) of the TFEU provides, “[i]n order to attain freedom of establishment as regards a particular activity, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, shall act by means of directives”. The Explanatory Memorandum states explicitly Article 50(2)(f) which refers to “the progressive abolition of restrictions on freedom of establishment in every branch of activity under consideration, both as regards the conditions for setting up agencies, branches or subsidiaries in the territory of a Member State and as regards the subsidiaries in the territory of a Member State and as regards the conditions governing the entry of personnel belonging to the main establishment into managerial or supervisory posts in such agencies, branches or subsidiaries”. The directive proposal, at least on the part on the SUP, is based on the freedom of establishment.

The 12th company law directive of 1989 was based on article 50(2)(g), at the time article 54(2)(g) of the Treaty establishing the European Economic Com-

47 Treaty, supra n. 27.
munity. It allows the European legislator to coordinate “to the necessary extent the safeguards which, for the protection of the interests of members and others, are required by Member States of companies or firms within the meaning of the second paragraph of Article 54 with a view to making such safeguards equivalent throughout the Union”.48 As the directive proposal replaces the 12th company law directive and integrates it in Part 1, article 50(2)(g) of the TFEU on approximation of national company laws is also the legal basis for the proposed directive. Article 50(2)(g) also applies to the SUP part of the directive since it is a national company form which has been harmonised on key elements. Nothing prevents the directive proposal from being based on two different paragraphs, especially since the proposed directive is actually two directives in one.

Two criticisms have been directed at this legal basis. First, the SUP proposal would violate the principle of subsidiarity (i). Second, the proposal should have been based on Article 352 of the TFEU and Article 50 of the TFEU does not allow for the creation of new national company forms (ii).

i. The principle of subsidiarity

The directive proposal has been challenged on the basis that it would violate the principle of subsidiarity which is provided for in Article 5 of the Treaty on the European Union (TEU) which states, “the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level”. This argument is very weak as the intervention of the EU legislator in company law has been wide and deep as far back as 1968 and continues, even after the principle of subsidiarity was introduced in the European Treaties by the Treaty of Amsterdam of 1997. For example, the second directive on capital of public limited liability companies was recast in 2012, despite its lack of a cross-border element.49 The same is true of the merger and divisions directives of 1977 and 1982 which also only apply to public limited liability companies, include no cross-border element and were amended in 2009 without subsidiarity being an issue. It could be argued that harmonizing private limited liability companies is

48 Treaty, supra n. 27.
49 Directive 2012/30/EU of the EU Parliament and of the Council of 25 October 2012 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 54 of the Treaty on the Functioning of the European Union, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent, OJ L 315/74 14.11.2012.
beyond the scope of the EU legislator since these companies are usually, but not always, small companies with limited geographical scope. However, this argument misses three points.50

First, the 1968 directive applied to both private and public limited liability companies. Also, the 12th company law directive of 1989, from which the SUP proposal derives, applied only to private limited liability companies and required the creation of a single-member company which, was a revolution in many Member States. It was all the more revolutionary that Member States gained an exception when their legislation provided that an individual entrepreneur may set up an undertaking, the liability of which is limited to a sum devoted to a stated activity (Art. 7). In addition, the SUP as proposed would not replace the existing single-member private limited liability companies, but would instead simply add a partially harmonised form alongside the existing one. Therefore, it cannot be argued seriously that the SUP would violate the subsidiarity principle.

Second, the SUP is essentially designed to be a cross-border company. The EU legislator has jurisdiction to intervene in company law when there is a cross-border element. Actually, the latest new directives and regulations adopted since 2000 all contain explicit cross-border elements. In the case of the SUP, the cross-border element is at the heart of the proposed directive’s very goal.

Finally, it cannot be expected that Member States will spontaneously harmonise the functioning of their national single-member private limited liability companies. Only the European legislator can force a harmonisation which will help the establishment of subsidiaries in other Member States. Therefore, the argument that the subsidiarity principle would be violated by the proposal is also, for this reason, baseless.

The proposal states, “the name of a company, which has the legal form of an SUP, shall be followed by the abbreviation ‘SUP’” (Art. 7). However, because the SUP is only a slightly harmonised company form, the name ‘SUP’ is perhaps misleading. There would, in fact, be twenty-eight different SUPs since many aspects of the form would not be harmonised under the proposed directive. It is essential to allow third parties to identify which national law is applicable to the SUP.

This is even a requirement of the case law of the ECJ.51 One solution would be to add the term “up” after the name of the national company form so that third

51 ECJ, Case C-212/97 Centros, para. 36.
parties would immediately know from which country the SUP is organized. There would be no need to add “SUP” because the “society” would already be included in the name of the private limited liability company. For example, an SUP based in Germany could be called a “GmbH-up” and could include the name of the founder as in “Müller GmbH-up”. In France, it would be a SARL-up, in the UK a Limited-up, etc. This would allow third parties to identify the applicable law and also the quality of the commercial registrar as this varies among Member States. In addition, this step would allow the brand “SUP” to maintain its reputation if one Member States abuses it since it would be easy for third parties to stop dealing with SUPs from this Member State.

The Council has realised this and the November 2014 text, adopted under the Italian presidency, states that “the name of a company, which has the legal form of an SUP, shall be followed by an indication of the Member State of registration and then by the abbreviation ‘SUP’ (Art. 3)”. However, the indication of the Member State of registration (DE, FR, DK, UK, etc.), which is provided by the new text, should be removed as it would create a very bureaucratic appearance. Further, this step is not even necessary since the names of private limited liability companies already differ in Europe in all cases with a few exceptions. For instance, Germany and Austria share the term “GmbH”, although the Austrian GmbH is sometimes called ÖGmbH. There is no reason for the SUP to be treated differently.

**ii. Article 352 of the TFEU as an invalid and article 50 as a valid legal basis**

The directive proposal has been criticised for its legal basis, especially by some in Germany but also by the European Economic and Social Committee (EESC). Critics allege that, like the SPE, the proposal should have been based on Article 352 of the TFEU because the proposed directive would create a new company form. Therefore, the required political vehicle is, in fact, a regulation and not a directive, and the Council would, therefore, decide with an unanimous vote. Obviously, the directive proposal stands no
more change to be adopted as a regulation than the SPE did, and those arguing for the application of Article 352 know this. The subtext, however, is that the Commission is circumventing the Treaty.

One author notes cautiously, “it seems that the Commission’s choice of legal basis was driven by the desire to take advantage of the ordinary legislative procedure and that the limited scope of the SUP Draft Directive was a consequence of this choice”.

Actually, as stated in the introduction, the idea of the SUP is to be found in the 2011 Report of the Reflection Group on the future of EU company law. Therefore, the SUP is an idea in itself with advantages and differences with the SPE. It is also important to note that the SUP was not conceived of by the Reflection Group or put forward in the Report as a way to implement the SPE by circumventing the Council. Quite the contrary, actually. First, the SUP is, to a certain extent, an “SPE killer”, as the members of the Reflection Group knew that the Commission would not support both the SPE and the SUP; it would be one or the other, but certainly not both. In addition, at the time the Reflection Group’s Report was drafted, the SPE was still being negotiated and its fate was not certain. Further, the Reflection Group’s Report, although supporting the idea of the SPE, showed limited support for the 29th company law regime. Therefore, it was probably not the idea of the Reflection Group to propose the SUP in order to help the Commission to circumvent the Treaty with an “SPE-lite”. The SUP is an idea in its own right.

The argument in favour of applying Article 352 of the TFEU relies on the fact that the SUP would be a new company form. The ECJ, in a decision concerning the legal basis of the European Cooperative Society (Societas Cooperativa Europaea or SCE) made clear that Article 50 of the TFEU could not be used to introduce new forms of “cooperative society in addition to the national forms”. However, the ECJ was referring to an SCE which is an EU company form whereas the SUP is not, instead receiving its legal personality from the Member States. This is a major difference, and the ECJ’s holding was obviously referring to an EU company form since it mentioned, “in addition to the national forms”. Therefore, Article 352 of the TFEU cannot be a valid legal basis for the SUP.

This argument has moved from opposing the directive itself to instead merely reducing its scope. The Rapporteur of the opinion of the Committee on the


Internal Market and Consumer Protection for the Committee on Legal Affairs has stated that she did, “not support the idea of creating a de facto new 29th legal regime at European level called Societas Unius Personae (SUP), as proposed by the European Commission and decides to replace it with the existing form of single-member private limited liability company”.58 This vision is not correct. As stated, the SUP is not a de facto new 29th legal regime but is instead a targeted harmonisation of national Member States company law. It could only become so if the SUP would receive its legal personality from the EU and could move its statutory seat across the borders of the Member States. This could only be a long-term possibility and would not happen, in any case, without a debate in both the EU Parliament and the Council.

One author has presented a detailed argument as to why Article 50(2)(f) of the TFEU might be a “problematic” or even “inappropriate” legal basis for the directive. The argument is that Article 50(2)(f) of the TFEU, which refers to the conditions for setting up agencies, branches or subsidiaries, cannot be interpreted to concern primary establishment of what would essentially be a new company form. The argument according to which the SUP would be a new company form needs discussion.

The proposed directive does not actually force Member States to introduce the SUP as an additional company form. Recital 10 of the proposal of directive allows them to “apply Part 2 of this Directive to all single-member private limited liability companies so that all such companies would operate and be known as SUPs. Alternatively, they should provide for the establishment of an SUP as a separate company law form which would exist in parallel with other forms of single-member private limited liability company provided for in national law”. The Commission rightly chose to minimize the impact of the directive by allowing Member States to keep their non-harmonized private limited liability companies if they wish to do so. Alternatively, Member States can decide not to introduce an additional company form but to instead keep the existing one which would be subject to more harmonisation. Some Member States prefer not to have too many company forms (e.g., Scandinavian countries) and could, therefore, choose this option. On the one hand, it could be argued that the SUP simply harmonizes the existing single-member companies, so that it does not create a new type of company. On the other hand, it can be argued that the SUP would harmonize so many rules that it should be considered a new type of company form. This latter view is not without its

merits, but even in this case, this view does not mean that Article 50(2)(f) of the TFEU is not a sound legal basis for the proposed directive.

First, despite the use of the term SUP, the form is far from being a fully harmonised company form. It is harmonised only in so much as is necessary to facilitate online establishment and govern certain aspects of its functioning. Only the rules regarding online creation with a contribution in cash are fully harmonised. Many rules regarding the functioning of the company remain governed by the national law of the Member States. For example, all rules relating to contributions in kind or related party transactions, which are not regulated in the proposed directive, would be those of the Member States of incorporation.

Therefore, the SUP appears more like a subtype of a national private limited liability company, like the UG in Germany, the SPRL-S in Belgium, the Srl semplificata in Italy, etc. From a national perspective, these forms are not considered to be new types of companies, but rather subtypes of existing ones. The SUP is no different from these subtypes. However, the SUP also harmonises the functioning of the company, which is not always the case with these subtypes. Therefore, the issue then is where to draw the line between a new company subtype and a new type of company?

As stated, it can be argued that even a company subtype is the equivalent of a new company type. However, even if the SUP is a new company form, this does not mean that Article 50 of the TFEU is not still a valid legal basis for its adoption. The Council’s legal service has taken the view that this legal basis would be valid. From this perspective, the 12th Company law directive of 1989 can also be used as a precedent. This earlier directive can be characterized as having created a new company form since it imposed a single-member in private limited liability companies, which in turn also modified significantly the functioning of the company. The legal basis for the 12th Company law directive was Article 50(2)(g) of the TFEU. The SUP only increases the level of harmonisation compared with the 1989 directive and includes a harmonised name, a purely formal difference. Therefore, the SUP proposal could also have been based only on Article 50(2)(g) of the TFEU. Finally, if the SUP proposal has no legal basis, then the 12th Company law directive of 1989 also has no more legal basis.

Also, although the approach of the Commission is innovative, the interpretation of the provisions of the Treaty by the ECJ has often been dynamic. The SUP is essentially a directive which imposes a higher degree of harmonisation

59 Opinion of the Council’s legal service’, n. 9, quoted by Malberti, supra at 243.
60 See for instance, validating the banning powers of the new European Securities and Markets Authority (ESMA) in the area of short-selling, ECJ, United Kingdom v Council of the European Union and European Parliament, Case C-270/12, 22 January 2014 ;
than previously considered possible or acceptable. Therefore, it is a difference of degree rather than nature, with the scope of previous directives usually more limited, although other (albeit unsuccessful) attempts have also been made at more harmonisation (e.g., draft fifth directive on public limited companies, the draft ninth company law directive on groups). Just because an approach is innovative does not mean that it is not legal. There is actually no reason to consider that, if it were asked the question, the ECJ would not support this analysis.

**b. The limited harmonisation of the functioning of the SUP**

The goal of the SUP proposal is not only to facilitate the establishment of subsidiaries in other Member States but also to facilitate the cross-border functioning of SME groups by harmonising some organisational rules. The Reflection Group actually included the proposal to have a single-member company in chapter 3 of its Report, “The contribution of governance and investors to long term viability of companies”, where it requested, “further simplification efforts” for SMEs, as well as in chapter 4 of the Report, “Groups of companies”. This is why the SUP is also available for groups. As noted by the Reflection Group in a separate article, “As a company with only one member and a simplified structure for decision making, the SMC would be ideal company for organising groups, an issue of particular interest to the European Commission in its Action Plan. To ensure its availability for SMEs, single-member ownership should be available for both natural and legal persons”. In addition, since the SUP is following in the footsteps of the SPE, which was designed for groups of companies, it is normal that provisions on the organisation of the SUP be included.

The relevant provisions are to be found in Articles 21 to 25 of the proposed directive and are subject to a more detailed analysis in this issue of the ECFR. However, the rationale behind these provisions might need further explana-

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tion. The harmonisation of the functioning of the SUP is designed to facilitate the cross-border functioning of the company (i). The proposal also includes a specific provision, designed for groups, allowing the single shareholder to give instructions to the management of the SUP (ii).

i. The rationale for harmonising the functioning of the SUP

A limited harmonisation of the functioning of the SUP is necessary for several reasons.

First, such harmonisation is necessary in order to reduce the costs of managing the company. One of the main goals of the SUP, like the SPE, is to allow a parent company, located in one Member State to easily manage its subsidiaries in other Member States. This harmonisation would be all the more useful if the parent company has subsidiaries in many Member States. Thanks to the partial harmonisation of the organisation of the SUP, the parent company knows how the SUP functions in all the Member States where it is located. It does not need to pay local lawyers or have an extensive legal department. Actually, in SMEs, legal departments are often limited to a single person. How could it be expected that the head of the legal department of, for example, a German SME, often only a single lawyer, would know the key rules on the functioning of a foreign private limited liability company in any or several or of twenty seven Member States? The SUP helps to considerably reduce this risk.

Second, this harmonisation will prevent Member States from modifying those rules and that will create an area of legal certainty. Company law, especially in the area of private limited liability companies, has often been subject to significant and repeated reforms. Therefore, if the SUP does not include rules regarding its functioning, the parent company, especially if it is a very small SME, would be at risk of violating the foreign Member State legislation for lack of knowing that a legal change occurred. Therefore, the harmonisation of some key rules is necessary to create legal certainty.

The provisions are limited to those that are necessary to make the SUP work in a cross-border environment. In addition, except for the right to give instructions, these provisions are not very different from the ones that usually apply in the Member States. Therefore, they should be acceptable to them. Finally, they should have a limited spillover effect on other company forms making those changes more acceptable.

Since the SUP would be a national company form, any rule not harmonised by the directive would default to the national rule in the Member State. For the same reason, the SUP would also subject to the application of the Acquis communautaire like any other national company form. However, one author
has argued that the *acquis* has been repealed regarding the representative powers of directors and authorized agents.\(^{64}\)

Although large groups would benefit from the SUP, as they could simplify their structure and reduce costs, the main beneficiaries of this targeted harmonization would be groups of SMEs which exist in many Member States. The reason for this is that large groups can easily bear the cost of using diverse corporate forms in the EU and having a large legal service to follow developments in other Member States. On the contrary, those cost are higher for SMEs which might constitute an obstacle to their establishment abroad. Here again, the directive would benefit SMEs disproportionately compared to larger groups.

This is actually acknowledged by the rapporteur in one committee of the European Parliament when it was suggested that larger undertakings be excluded from the benefits of the directive.\(^{65}\) The SUP would only be available to micro and small single-member private limited liability companies as defined in Directive 2013/34/EU.\(^{66}\) The EESC also argued for the SUP to only be available to companies that meet the criteria set out in Article 3(2)\(^{67}\) of the Accounting Directive (2013/34/EU),\(^{68}\) although a counter opinion by the Group of the Employees’ representative rejected this limitation. These proposals cannot be supported. The Reflection Group previously stated in a separate article that it did “not support limiting the SMC to companies below certain thresholds and do not see compelling reasons for this”.\(^{69}\) First, there is no example where a company form is limited by size, except private limited liability companies in some Member States when the number of shareholders exceeds certain levels. Second, this would create significant complexity as companies grow larger. Finally, this approach is illogic. If the SUP is a positive development, then why should larger companies not also benefit from it? This potential exclusion seems driven by a hostile and ideological view to groups, unless it can be explained by the fear, ungrounded also,\(^{70}\) that the SUP could be used to circumvent co-determination.

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64 Malberti, *supra* n. 57 at 253.
65 Draft Opinion, *supra* n. 59.
67 Such companies do not exceed the limits of at least two of the three following criteria as of their balance sheet dates: balance sheet total: 4,000,000 EUR; net turnover: 8,000,000 EUR; average number of employees during the financial year: 50.
68 See, EESC, *supra* n. 56.
69 Former Reflection Group, *supra* n. 63.
70 See, this article, at 173.
ii. The right to give instructions

One key innovation in the directive proposal is the right of the shareholder to give instructions to the management body (Art. 23).\footnote{Teichmann, supra n. 64.} This provision would be very useful in groups of companies, although it is not limited to them and would also be applicable when the single shareholder is a natural person. The right to give instructions would help the parent to control the subsidiary, and especially its management at a distance.

Groups of companies are often managed in a centralized way through instructions which can be oral or written. Therefore, it is essential that they are granted legal certainty in all Member States and be protected against a change in the other Member State legislation.

This provision does not actually constitute a major change in many Member States. The right of the single-member to give instructions to the management body in the context of private limited liability companies is explicitly recognized in many Member States (e.g., Germany, the Netherlands). Therefore, this provision has been well received in Germany.\footnote{See P. Hommelhoff, ‘Ein Neustart im europäischen Konzernrecht’, 2 Kölner Schrift zum Wirtschaftsrecht (2014), p. 63, 67 et seq.; P. Hommelhoff, ‘Die Societas Unius Personae: als Konzernbaustein momentan noch unbrauchbar’, 20 GmbH-Rundschau (2014), p. 1065, 1071 footnote 61; St. Jung, ‘Societas Unius Personae (SUP) – Der neue Konzernbaustein’, 11 GmbH-Rundschau (2014), p. 579, 590; J. Schmidt, ‘Der Vorschlag für eine Societas Unius Personae (SUP) – super oder suboptimal?’, 9 GmbH-Rundschau (2014), p. R129, R130.} In other Member States, such as France, such right to give instructions is not recognized explicitly. However, although there is no case law on this specific point in France, it could probably be organized in the articles of associations. Therefore, the differences might be more of form rather than substance.

In addition, the single-member private limited liability company implies a different approach. Concepts developed for private limited liability companies with several shareholders should not be applied to single-member companies too rigidly. For instance, Article 21 of the proposed directive states, “the single-member shall be allowed to take decisions without calling a general meeting”. This means that a “single shareholder meeting” can be reduced to a phone call or even an e-mail to the manager. The only formal requirement is that the decisions taken by the single-member of an SUP be recorded in writing by the single-member and kept for five years.

Therefore, since the SUP does require that a shareholder meeting be called, the powers of the “shareholder meeting” can be exercised in a very informal way.
This includes modifying the articles of associations to increase the powers of the single shareholder regarding certain types of management decisions. Therefore, in this context, the right to give instructions to the management body only reflects the absolute power that the single shareholder, especially in groups, can exercise in such companies.

The right to give instructions is limited by rules applicable in the Member State of incorporation. Article 23 states that instructions shall not be binding for any director insofar as they violate the articles of association or the applicable national law. This means that the manager cannot be bound to violate the law. One important consequence of this provision is that, contrary to what has sometimes been thought in France, Article 23 does not include a covert recognition of the interest of the group. In those Member States that do not recognize the interest of the group (e.g., Germany, Austria), the manager of the subsidiary would not be allowed to enter into a transaction with the parent company which would be detrimental to the subsidiary. The proposed directive does not impose the recognition of the interest of the group in those Member States which do not recognize it.

However, the issue of whether to recognize the interest of the group in the directive proposal has been raised in Germany by several academics. This change would greatly facilitate the management of German cross-border groups in other Member States even if what the interest of the group actually is would be decided by national courts or law. This would be a major progress in Europe, is requested by companies in some Member States and could be more accepted since the SUP would be a special and distinct form of company. Therefore, there could arguably be no spillover effect to other companies and entrepreneurs in those Member States that do not recognize the interest of the group and would be able to use the SUP. The name “SUP” would inform third parties of this legal situation, among others.

Unfortunately, the political acceptability of such reform, at least a reform in the shape of the SUP, seems currently low. However, there is academic and business support for such a reform at the European level. An expert group led by Professors Marcus Lutter and Peter Hommelhoff recently published a proposal calling for the recognition of the interest of the group at the European level through a directive. A leading French think tank, working with

73 CCIP, Proposition de directive relative aux sociétés unipersonnelles à responsabilité limitée, 5 June 2014, p. 10.
74 F. Chiapetta and U. Tombari, Perspectives on Group Corporate Governance and European Company Law, 9 ECFR 3 (2012), 261–274.
75 Forum Europaeum on Company Groups: Proposal to facilitate the management of cross-border company groups in Europe, ECFR 2015, 280–287.
experts from the CCIP, has also supported a recommendation supporting the recognition of the interest of the group at the European level.76

III. A secure company law only passport

The SUP acts as a passport facilitating the establishment of subsidiaries, especially in other Member States. This passport is equipped with technical security features (1) and is designed to be both limited to company law and neutral as to tax and/or labor law (2).

1. A secure passport

The proposed directive requires both online corporate registration (with protections against fraud) (a) as well as protections for creditors (b).

a. Protection against fraud in on-line registration

In order to allow entrepreneurs to easily set up an SUP in another Member State, the directive proposal requires that Member States provide for online registration.77 The SUP could still be incorporated physically on paper but online registration must be offered. Article 14 of the proposal of directive states that “Member States shall ensure that the registration procedure for newly incorporated SUPs may be completed electronically in its entirety without it being necessary for the founding member to appear before any authority in the Member State of registration (on-line registration)”. According to the Impact Assessment, in “12 [Member States] (Austria, Belgium, Croatia, Cyprus, Czech Republic, Germany, Greece, Hungary, Italy, Luxembourg, the Netherlands and Spain) there is no possibility of direct on-line registration.”78 The applicants have to appear in person before a notary or a legal advisor who verifies, e.g. founder’s identity, the chosen name and either prepares the articles of association (Cyprus) or puts them in a notarial deed

78 Here also the differences among Member States are significant. For instance, in Spain single-member can register personally a company on-line, but the prior involvement of a notary in the form a notarial deed is still necessary.
(the remaining [Member States])”.79 The directive would change this and force these Member States to embrace the digital age. Just like for the suppression of the minimum capital, here the Commission is also playing a very useful role by encouraging and engaging in a race to modernisation.

By imposing such a requirement, the Commission is acting in order to keep Europe up to date with the digital age. The digital age is not a choice but a fact and it is no longer possible or acceptable to ignore it. As stated by Neelie Kroes, former European Commissioner for Digital Agenda for Europe, “We have a problem today of two Europes: a digital Europe and an analogue Europe. Of digital mind-sets and analogue mind-sets. These are two Europes that rarely talk to each other. Two Europes that hold back all of Europe because they are not in sync”.80 The 2013 “Manifesto for Entrepreneurship and Innovation” to power growth in the EU called for the possibility to create on-line companies with low minimum capital and unified requirements across the EU to make it easier for cross-border investments to flow from investors in one country to companies in another.81 The Reflection Group’s Report had also earlier advised further simplification efforts for SMEs, including electronic access to corporate procedures (e.g., incorporation).82

However, this innovation has raised concerns, especially among notaries, that the SUP could facilitate cross-border money laundering (i) and would be prone to identity fraud in a cross-border environment (ii). Those concerns are either exaggerated or entirely unjustified.

i. The SUP and money laundering

Concerns that the SUP would facilitate money laundering83 are not justified. First, all anti-money laundering (AML) directives apply to the SUP. Therefore, “Obliged entities”, such as notaries and banks, will continue to fulfil their role. A large number of Member States, although not a majority, (including Germany, Austria, Belgium, the Netherlands, Luxembourg, Spain and Italy) rely on notaries (or attorneys) for incorporation. Therefore, notaries in those Member States are obliged to conduct AML checks when they incorporate a

79 Impact Assessment, supra n. 4 at 26.
81 http://startupmanifesto.eu/.
company. The SUP changes nothing in this regard. The involvement of notaries in the incorporation process is a choice of the Member States and should not be modified by the European legislator. Actually, the directive is neutral as to the involvement of the notaries in the incorporation process and only requires the existence of national online registration websites with links to the registration websites in other Member States. Those websites can be set up by notaries in the concerned Member States and function within the parameters decided by the Member States.

Second, Article 17 of the proposed directive requires, in the case of online registration, that the consideration be paid into an existing bank account of the future SUP. Therefore, according to the proposed directive, it is not possible to create an SUP online without first opening a bank account. This means that the bank will have to do an AML check on the founder. If the SUP is created by the conversion from a non-harmonised private limited liability company, then offering online registration is no longer compulsory (because the requirement is to offer online registration, not online conversion) and a previous AML check would have been completed when the company was first incorporated. The cash contribution must be deposited into a bank account located in the EU. This requirement will allow some Member States, such as France, to get rid of, at least in the case of the SUP, national legal provisions which require that the bank account be located in its own jurisdiction.84

Third, the SUP directive even goes even beyond existing AML rules in requiring the registration authority to identify the “beneficial owner” (Art. 13(1)(c)). This is a new requirement, one that, in practice, will not always be easy to satisfy, but which raises the bar against money laundering. It is the first time that this requirement appears in European company law. Therefore, the SUP proposal is in full compliance with the latest developments in AML.

**ii. The SUP and the identification of the single shareholder**

The concern over cross-border identity fraud is not better founded. Quite to the contrary, the SUP lowers the risk of identity fraud compared to a physical incorporation.

First, some Member States already allow cross-border electronic registration, although it is sometimes limited to natural persons. For instance, according to the Impact Assessment, in Portugal, “Portugese, Spanish and Estonian citizens are able to create a single-member private limited liability company online

using their respective digital certificate from their national identity card, but no other foreign EU citizens”. Also, in Estonia, “for holders of (mobile) Estonian, Finnish, Portuguese, Belgian and (mobile) Lithuanian ID-cards there is a possibility to set up a company online by using an electronic registration portal”. As stated by Kristi Värk, the Estonian Counsellor for Judicial Affairs at the Permanent Representation of Estonia to the EU in a conference in Brussels, “[t]he portal entails security measures that provide the users with maximum level of security. As every other public information system the portal is connected to a secure data exchange layer X-road (see further https://www.ria.ee/x-road/) and every single click made in the portal is logged, meaning a digital ‘fingerprint’ is saved from every activity carried out with the ID card. Also ID-card and mobile-ID based authentication, logging in and digital signing give the validity to the deeds. All this is backed up by relevant legislation. The portal has contributed to reduction of red tape and costs and shortening of the time spent on procedures; reduced the level of mistakes; ensured better data quality and a higher quality of service for citizens and entrepreneurs; provided real-time overview of sent applications, complete electronic archive and a high usage rate among other benefits”. Therefore, the Estonian example shows that online registration actually reduces the number of mistakes and should do the same for fraud since it is harder to alter an electronic chip than a paper certificate.

Second, Member States may lay down rules for verifying the identity of the founding member and the acceptability of the documents and other information. Article 14(5) of the proposed directive provides, “Member States may lay down rules for verifying the identity of the founding member, and any other person making the registration on the member’s behalf, and the acceptability of the documents and other information submitted to the registration body. Any identification issued in another Member State by the authorities of that State or on their behalf, including identification issued electronically, shall be recognised and accepted for the purposes of the verification by the Member State of registration”. This article means that the Member State of incorporation has to recognize the identification means used in another Member State. However, it can “lay down rules for verifying the identity of the founding member” which means that it can request more information than the one required in the other Member State. The Member State of registration can introduce at any moment additional procedures to control identity of both its own and foreign citizens as long as it is possible to register online.

85 Impact Assessment, supra n. 4 at 55.
86 Impact Assessment, supra n. 4 at 51.
This means that a Member State can raise the bar, and almost close its “electronic border” if it suspects fraud coming from founders in other Member States.

Finally, the SUP proposal is to be connected with Regulation n°910/2014 of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market (eIdentification Regulation).88 The eIdentification Regulation had not yet been published when the SUP proposal was introduced so the eIdentification Regulation could not be referred to in the proposal. However, they are inextricably linked. Article 6 of the eIdentification Regulation creates a system of mutual recognition of electronic identification methods provided that “the electronic identification scheme is included in a list published by the Commission”. In addition, “the assurance level of the electronic identification means corresponds to an assurance level equal to or higher than the assurance level required by the relevant public sector body to access that service online in the first Member State, provided that the assurance level of that electronic identification means corresponds to the assurance level substantial or high”. Finally, “the relevant public sector body uses the assurance level substantial or high in relation to accessing that service online”. This system of mutual recognition should enter into force in September 2018.89 Therefore, Member States have already committed themselves to cross-border mutual recognition of electronic identification systems which they will themselves develop at home. They will decide what is sufficient. The SUP is simply building on this existing agreement.

The proposal of directive also includes strong protections for creditors and third parties.


b. The protection of creditors and third parties

The proposal of directive on the SUP reduces the minimum capital to 1 EUR or the equivalent minimum unit in another currency for the Member States which do not use the euro. However, this reduction is compensated by stringent rules on distributions (i). Another example of the strong concern for the protection of third parties is the disclosure of information on disqualification of directors in another Member State (ii).

89 Art. 52 of the Regulation (EU) n°910/2014.
i. The rules on distributions

Member States which have reduced the minimum capital to 1 EUR or removed the requirement entirely have not always adopted balancing rules. This is the case, for instance, in France, which eliminated the minimum capital requirements for both the SARL and the SAS without introducing any compensatory measures. Many other Member States reduced the minimum capital required as a trade-off that companies build up reserves up to the previous amount of minimum capital. This is the case in Germany (UG), Belgium (SPRL-S), Italy (*Srl semplificata*) and Spain (SLFS). Luxembourg is following the same approach. This approach, however, is not actually logical. If the minimum capital is a real protection of creditors, then it should not be reduced at all. If it is not an effective protection tool, then there should be no need to require a build up of reserves. This appears as a political and temporary compromise between two opposing logics.

The proposed directive prohibits Member States from requiring the building up of reserves. This is a reflection of the fact that the legal capital is not the most effective protection tool for creditors, whether at incorporation or later. However, it has also to do with the cross-border nature of the SUP. If the single shareholder is located in a different Member State from the one in which the SUP is incorporated, then the shareholder should be protected from unexpected changes in the legislation regarding reserves. Otherwise, the single shareholder might find himself unknowingly in violation of national law.

The directive proposal includes a very strong protection for creditors. This is justified by the fact that since the SUP is designed to be a cross-border company, it is necessary that creditors in the Member State of incorporation benefit from a strong protection against distribution sent to the single shareholder located in another Member State. This system is inspired by the UK and the Netherlands and is based on a balance sheet and a solvency test. The proposal also defines distributions very broadly to include, for example, dividends, “hidden distributions” and even capital reduction. Arguably, the definition is just too broad. In addition, the “solvency statement” has to be signed by the management body and be disclosed. Member States could also require a control by a statutory auditor if they wish. The directive provides for the liability of the director and of the single-member for the amount of the distribution if they knew, or, in view of the circumstances, ought to have known that either the balance sheet test and/or the solvency test were not satisfied.

This “solvency statement” constitutes a very strong protection for creditors and a much more effective one than the minimum capital. The EESC claimed,
“the solvency statement is in any case fraught with uncertainty and the risk of an incorrect forecast is incurred by the creditor” but this analysis is not correct. Quite to the contrary, a very serious risk lies with the managers.91 In response, a French lawyer commented that it is “heavy”, a “deterrent” and he wondered “which manager will accept to sign it”.92 Therefore, concerns that the SUP would not protect enough creditors seem unfounded. Actually, the “solvency statement” put in place by the proposed directive will increase, not reduce, the level of creditor protection currently available in many Member States.

ii. Information on disqualification of directors

Another significant and positive innovation included in the directive proposal is the protection of third parties regarding the disqualification of directors. Article 22(5) of the proposal of directive provides, 

“[i]f the director has been disqualified by a judicial or administrative decision taken in another Member State and this decision remains in force, the decision must be disclosed upon registration in accordance with Article 13. A Member State may refuse, as a matter of public policy, the registration of a company if a director is the subject of an outstanding disqualification in another Member State”. This article follows a recommendation from the Reflection Group that “qualifications and similar censure are made known throughout the Union to avoid that unacceptable behaviour is continued by use of cross-border mobility. However, substantial problems not just concerning technology, but also and more seriously concerning privacy, data protection and fundamental rights must be solved first”.93 This provision improves the protection available to third parties in the single market since it can prevent currently disqualified directors in one Member State from managing a different company in another Member State while remaining active in the first Member State. Currently, there is usually no exchange of information among Member States on this issue; the directive would change this. The provision is balanced since Member States are not obliged to bar a manager disqualified in another Member State and can exercise discretion.

The SUP includes very strong protection measures and would actually benefit creditors and third parties in many Member States.

91 See, EESC, supra n. 56 at pt. 4.2.4.
93 Report, supra n. 83 at 35.
The directive proposal is limited to company law only. It does not intend to affect the rights of the workers or tax issues, both of which remain untouched. However, concerns have been raised because the directive proposal allows for the split of the statutory seat and the real seat. Following the same initial approach as in the SPE, Article 10 (Seat of the SUP) of the directive proposal provides, "[a]n SUP shall have its registered office and either its central administration or its principal place of business in the Union". The implementation of the statutory seat doctrine could have had an impact, but is has since been removed (a). This impact was exaggerated as the current situation shows (b).

a. The choice between the real seat and statutory seat

The directive proposal allows for the separation of the statutory seat from the real seat. However, this approach has faced opposition from the Member States and has been dropped during the negotiations in the Council (i). The statutory seat is not necessary for the SUP to function cross-border, although some negative harmonisation could help (ii).

i. The statutory seat approach in the proposal of directive

This approach has raised concerns among some Member States who apply the real seat doctrine, workers’ associations and the EESC, which feared “letter-box companies".94 However, the fear of some abuses should not be the main driver for policy making.

This provision is logical from the point of view of the Commission because it facilitates the establishment of companies abroad. It also presents the advantage that a court will not pierce the corporate veil of the SUP on the ground that the manager receives instructions from the single shareholder located in another Member State. Since the directive allows for the splitting of the seat between Member States, this would be legal. It also reflects the nature of the SUP as an instrument for groups of companies. One parent company based in Munich could simply manage subsidiaries located in several Member States without having to be concerned with being accused of being the real seat.

Although the separation of seat would be an improvement and facilitate freedom of establishment in Europe, the case for the Commission to impose it is actually weak.

94 See, EESC, supra n. 56.
First, the choice between the statutory seat and the real seat is a core element of each national company law. The Commission should not modify this choice which is based on many different elements but has mainly to do with stakeholder protection.

Second, the case law of the ECJ does not impose on Member States the statutory seat. Each Member State remains free to apply either the statutory or the real seat doctrine. What the ECJ case law imposes is that if a Member State applies the statutory seat doctrine, another Member State which applies the real seat doctrine must allow the company to do business and cannot force its application of the real seat. Essentially, the ECJ imposes a mutual recognition of the different systems while not requiring one system. Therefore, the directive goes one step further than what the ECJ case law holds. Imposing the statutory seat approach by way of a directive is not justified, at least not in the current environment. For the same reason, the calls on the European Trade Union Confederation (ETUC) to impose the real seat doctrine in the SUP cannot be supported. This demand originates from confusion between supranational forms and national company forms.

Finally, since the SUP is a subtype of the national private limited liability form, it should not be subject to a different regime in Member States which apply the real seat doctrine to their other types of companies.

One of the reasons why the SPE failed was because Member States could not agree on the statutory seat. Therefore, it is politically wise to leave the choice of the statutory or the real seat of the SUP up to each Member State in order to not compromise the whole directive. The compromise reached under the Italian presidency is positive since it respects discretion of the Member States. The new Article 10 states, “[t]he Member State of registration may provide that the registered office and head office of an SUP shall be located in its territory in accordance with the applicable national law”.

### ii. The real seat is no obstacle to the cross-border nature of the SUP

The SUP should remain an attractive form for cross-border establishment even if the Member State of incorporation applies the real seat doctrine. However, what would be essential is that Member States should not be allowed to require the managers to reside in the same place where, whether the real or the statutory seat, is located. If a Member State was to require a physical residence at the place of the real or statutory seat, this could defeat the purpose of cross-

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95 See ETUC ‘Position on single-member private limited liability companies’, 11–12 June 2014. “Prior to any further initiative on company law, the EU legislator must devise the appropriate rules so as to ensure that the registration place is linked to the place of main business”.
border establishment especially for very small SMEs. Therefore, a provision to this effect could be included in the directive.

\textit{b. The neutrality of the SUP towards the co-determination system}

The fear that the SUP would allow circumvention of co-determination laws, from Germany or from other Member States, because it would be possible to have a separation of the statutory and real seat, is exaggerated. The SUP is neutral towards co-determination (i). The current situation already allows for circumventing co-determination and the SUP does not seem to be the adequate instrument to achieve these goal anyway (ii).

\textit{i. The neutrality of the directive towards co-determination}

Contrary to the SPE, the proposed directive does not include specific rules regarding co-determination. The reason is that the SUP is a national company form and not a supranational one. Therefore, national rules regarding co-determination in the Member State where the SUP is incorporated automatically apply. Since the SUP is a national company form, there is also no provision in the proposed directive on the transfer of the statutory seat. This is left to national law. Therefore, contrary to the SPE which could move its seat in another Member State, there is no need to include in the directive a regime to protect the rights of workers, especially co-determination in case of transfer of seat.

An amendment, allowing each Member State to keeps its seat system rather than imposing the statutory seat, has the added advantage of avoiding the complex solution, considered in the case of the SPE, in which a Member State would be able to introduce co-determination if the real seat of the company would be in a Member State which has such system and the conditions relating to the number of employees would be satisfied.

\textit{ii. The lack of attractiveness of the SUP to circumvent co-determination}

The argument according to which the SUP would facilitate the circumvention of the German co-determination system, or systems of other Member States, is not credible.

ECJ case law allows a citizen in a Member State (e.g., Germany) to create a company in a Member State applying the statutory seat doctrine (e.g., the UK) and to do business through a branch setup in Germany. The proposed directive does not change anything to this current situation. It has been feared that the SUP would allow more cases like “Air-Berlin”, a UK public limited company
having its real seat in Berlin and therefore escaping the German system of co-determination. However, no legal rule currently prevents a German company from establishing its statutory seat in the UK and having its real seat in Germany. Even if the SUP had imposed the separation of the statutory and the real seat, it is difficult to see why this would have led to more companies escaping co-determination since this is already possible?

In addition, the SUP is ill-conceived as a vehicle to escape co-determination. The main advantage of the SUP is its ease of establishment and simplicity of functioning. However, the reduction of those costs is probably not a major concern for large German companies reaching the five hundred employee threshold and wishing to escape co-determination. If the company is still small, then it is already possible to create a UK limited in a matter of hours, and the issue of co-determination is not even an issue. Therefore, as stated by Stephan Harbarth, “it is actually doubtful whether the common European legal form for small companies would really be used to circumvent national co-determination rules, as is feared by trade unions in particular. The principle of freedom of establishment for companies within the European Union already allows the use of legal forms from other Member States which are exempt from co-determination, including in Germany. Given the possibilities which already exist, it is therefore questionable whether widespread use would be made of the common European legal form for small companies for the purpose of avoiding co-determination”.

IV. Conclusion

The SUP proposal has suffered, especially in France and Germany, from an “SPEstalgie” which has left those who should have supported it from the start less supportive and vocal than those who criticised the proposal for various reasons. The BDI and some members of the German Bundestag have even initially called for the SPE to be reintroduced. This has slowed down the support for the SUP from business associations who were hoping that the SPE would be proposed once again. However, the main advantage of the SPE for its supporters is also the main reason why it could not be agreed in the Council: its supranational nature which allows for the transfer of seat and therefore obliges to organise a complex system to make sure that German co-determination cannot be circumvented. In Europe currently there is not enough political support for a directive on the cross-border transfer of seat that the SPE

96 Harbarth, supra n. 13 at 233.
97 Harbarth, supra n. 13 at 234–235.
98 Supra n. 20.
would have made possible. As such, the SUP is Europe’s most realistic possibility to achieve most of the objectives of the SPE. If some Member States want to support smaller supranational forms, a more politically acceptable alternative would be to amend the Societas Europaea (SE) in order to make it more accessible to SMEs. In the meantime, the SUP is the only alternative to the SPE available, and it would bring with it many SPE benefits in terms of modernisation of Member State law. In the long-term, if there is enough political support, the SUP may even be turned into a supranational form with flexibility for more than one shareholder, effectively reviving the SPE.

Despite many real benefits, or rather because of them, the SUP has its critics. But there is nothing to be afraid in the SUP. The suppression of minimum capital has already been in force in many Member States and has even spread due to its benefits. Online registration, including cross-border, has also been tested successfully in several Member States. In Estonia, it seems to have even reduced the possibility of fraud. The SUP is not revolutionary but evolutionary as it reflects majority and/or tested practice in the EU. If they are concerns on anti-money laundering or identity fraud, which are serious issues which need consideration although the claims made so far seem much exaggerated, they could certainly be accommodated by way of amendments in the Council and the Parliament. Necessary changes to the proposal should be tolerated as long as, put so succinctly at the conference by the Commission’s representative, Bartlomiej Kurcz, these changes do not “turn a horse into a camel”.

As to the functioning of the SUP, this part of the directive is the one that is the most similar to the SPE. However, it faces opposition from some Member States despite the fact that, apart from the right to give instruction, it is very close to their own national law. The single-member company is the simplest company form that exists in every Member States so that rules are rather similar or differ only on, essentially, technical points. Despite this proximity, some opposition remains that seems grounded in the reluctance to change any provision of national Member State law. This situation is disappointing. Europe cannot be reduced to a Union where benefits come without any constraint such as being asked to modify some technical provisions of one’s company law. This conservatism is also paradoxical considering the instability of company law in the last years which is in a state of permanent transformation in many Member States. In addition, the part on the functioning of the SUP would simply add a company form and not change the existing ones with probably limited if not absolutely simply no spillover effect. Some Member States seem too conservative and, unfortunately, also simply lack European spirit.

The reality is that Europe is suffering from low economic growth and high youth unemployment, especially in the south. The SUP is not a magical bullet,
able to solve all of the economic problems but is instead a single tool, although potentially a powerful one, in the EU tool box that can help the Member States suffering from slow growth and high unemployment as well as reinforce the competitiveness of others. It is an excellent, secure and targeted proposal that should help create jobs. The Member States that have been the most dynamic economically since the financial crisis, especially in central and eastern Europe, are those who have embraced these changes. Europe should, as a whole, follow their lead to get out of this economic slump.