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European Economic and Social Committee

INT/744
Single-member private
limited liability companies

Brussels, 10 September 2014.

OPINION

of the
European Economic and Social Committee
on the

**Proposal for a Directive of the European Parliament and of the Council on single-member
private limited liability companies**

COM(2014) 212 final - 2014/0120 (COD)

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On 16 April 2014 the European Parliament, and on 6 May 2014 the Council, decided to consult the European Economic and Social Committee, under Article 50 of the Treaty on the Functioning of the European Union, on the

Proposal for a Directive of the European Parliament and of the Council on single-member private limited liability companies

COM(2014) 212 final – 2014/0120 (COD).

The Section for the Single Market, Production and Consumption, which was responsible for preparing the Committee's work on the subject, adopted its opinion on 15 July 2014.

At its 501st plenary session, held on 10 and 11 September 2014 (meeting of 10 September), the European Economic and Social Committee adopted the following opinion by 127 votes to 50, with 15 abstentions:

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1. **Conclusions and recommendations**

- 1.1 The European Commission's proposal for a directive on single-member private limited liability companies (*Societas Unius Personae* – SUP)¹ is designed to make it easier for SMEs to operate on a cross-border basis. The EESC believes that, as it stands, the proposal is in need of further development, since many of its provisions entail (serious) potential risks to the proper conduct of trade on the internal market and to the interests of creditors, consumers and employees. Therefore, the EESC strongly urges the Commission to take account of the recommendations set out in this opinion and to apply them.
- 1.2 The choice of legal basis (Article 50 TFEU) is unconvincing, and appears to be primarily aimed at circumventing the requirement for unanimity in the Council and ensuring that this initiative does not fail as the European private company (SPE) has. The intention may be for SUPs to be formally enshrined in national law as an alternative company form, their essential characteristics are nonetheless clearly defined in supranational law. The legal basis should therefore be Article 352 TFEU.
- 1.3 The EESC endorses the objective of making it as easy as possible for SMEs, in particular, to set up companies. However, the minimum capital requirement for SUPs of EUR 1, and the prohibition on requiring them to build reserves, effectively constitute a "free" limitation of liability. They may cause market parties to require personal guarantees from the business owner to reassure third parties (consumers, suppliers, creditors) which will nullify the advantages of the limited liability.
- 1.4 The EESC stresses the need to encourage the creation of healthy companies and therefore recommends requiring a substantial minimum share capital appropriate to the company's purpose, in the form of a "credibility threshold" for SUPs, in order to protect the interests of creditors,

¹ COM(2014) 212 final.

consumers, employees and the general public and to avoid any risk to business. This could be based on the experience of certain Member States where a reduction in the initial share capital requirement has been counterbalanced by a "saving" scheme whereby the company has to build reserves in subsequent years, to avoid long-term undercapitalisation. For the sake of "company clarity", a reference to limitation of liability and the country of registration should be added to the name of a SUP.

- 1.5 The EESC believes that a SUP should not be registered in a place where it carries out no business activities whatsoever (letter boxes). The proposed distinction between a company's registered office and its administrative headquarters, which is a first for a European company form, therefore sets a precedent, which has raised concerns at the EESC. In conjunction with the provision that SUPs are subject to the law of the State in which they are registered, it could jeopardise employees' participation rights, but also enable circumvention of national tax law.
- 1.6 It is possible that the formal transfer of a company's registered office, and the resulting change of company statute, could undermine the right to participate in company decision-making bodies (supervisory board or management board). The EESC therefore explicitly calls for SUPs to have a single registered office and administrative headquarters, as is the case for other supranational legal forms such as the European company (SE) or European cooperative society (SCE). Furthermore, the EESC calls for employee participation rights in a Member State where a SUP carries out its main business activities to be guaranteed and for unfair competition to be resolutely tackled. The EESC therefore feels that uniform rules on SUPs in relation to employee participation are also needed.
- 1.7 The EESC believes that, in the interests of company founders, it is important to ensure that a company can be established quickly within an appropriate time frame. However, the use of a purely online procedure for registering SUPs can raise problems and risks if the identity of the company founder is not checked. The omission of identity checks would reduce transparency concerning business partners, undermines the integrity of legal transactions, and harms consumer interests. It would encourage and facilitate the creation of "letterbox companies" and bogus self-employment. Nevertheless, in order to take account of the desire for online registration, the Member States should be free to provide for this type of registration on a voluntary basis. In this case, however, there should be a preliminary identity check, as well as measures by the competent authority and/or notaries to provide the founder of the company with information and advice.
- 1.8 The EESC approves the intention to introduce a new form of company making it easier for SMEs (including start-ups and micro-enterprises) in particular, to operate in the single market. To ensure the proposed directive is favourable for SMEs, its scope should be restricted to such companies. This instrument is not intended to give internationally operating groups of companies the option of running subsidiaries that may have hundreds or thousands of employees as SUPs. The EESC therefore proposes that the SUP should only be available to companies which meet the criteria set out in Article 3(2)² of the Accounting Directive (2013/34/EU)³. This would mean that when the SUP reaches a certain size, the company has to be turned into another legal form.

² Such companies do not exceed the limits of at least two of the three following criteria on their balance sheet dates: balance sheet total: EUR 4 000 000; net turnover: EUR 8 000 000; average number of employees during the financial year: 50.

³ [OJ L 182, 29.6.2013, p. 19.](#)

1.9 To sum up, it should be noted that adoption of the draft directive would result in national principles of company law for limited companies being called into question in a number of Member States. In view of the choice of legal basis, the EESC questions whether the proposal is compatible with the subsidiarity principle. It therefore calls for the status of SUP to be available only to companies that are active internationally and are operating in at least two Member States at the time of registration or can credibly demonstrate that they will be doing so at the latest within a specified time (two years, for example) of their registration. The Proposal for a European Foundation (EF)⁴ and the European Parliament's interim report on this could serve as a model here.

1.10 For the reasons given, although the EESC welcomes the Commission's efforts to support SMEs in the area of company law, it still sees a considerable need to discuss the directive's actual content. The EESC can only endorse the proposal if the recommendations set out in this opinion are followed. In particular, a balanced solution now needs to be found in close cooperation with the stakeholders, which unfortunately were not consulted on an equal basis by the Commission beforehand.

2. **General comments on the proposal for a directive**

2.1 Back in 2008, the European Commission tried, by means of the proposal for a European private company statute (SPE)⁵, to offer SMEs an instrument facilitating their cross-border activities, which would be simple, flexible and uniform in all Member States. This initiative ultimately failed in the Council, and the Commission consequently announced that it was withdrawing the SPE proposal as part of the REFIT programme⁶.

2.2 The Commission gave interested parties the opportunity to express their views at a general public consultation on the future of European company law (February 2012) and an online consultation on single-member companies (June 2013). On 13 September 2013, the Internal Market and Services DG then met business representatives to discuss the Commission's proposed initiative. According to the Commission, this discussion included, among others, *BusinessEurope*, the European Small Business Alliance, chambers of industry and commerce, and *Eurochambres*. Evidently, workers' representatives were not invited, nor were equivalent discussions held with the trade unions and consumer associations.

2.3 Subsequently, on 9 April 2014, the European Commission published its proposal for a directive on single-member private limited liability companies (SUPs), which is specifically described as an alternative approach to the SPE. Its aim is to make it easier for SMEs to set up companies abroad.

2.4 Member States should provide in their legal systems for national company law forms that would follow the same rules in all Member States and would have an EU-wide abbreviation - SUP (*Societas Unius Personae*). The stated aim of the proposal is to diminish set-up and operational costs. It provides for simplified online registration, and dispenses almost completely with minimum

4 COM(2012) 35 final.

5 COM(2008) 396 final.

6 See annex to COM (2013) 685 final

legal capital for establishment. Creditors would, it claims, be protected by the obligation for the director(s) to control distributions.

- 2.5 Member States would no longer be allowed to require that an SUP's registered office and its central administration be necessarily located in the same Member State. This is the first time that a European company form has allowed for such a separation. The SUP would be subject to the law of the Member State in which it is registered. The Commission proposal makes absolutely no mention of employees' participation rights.
- 2.6 The Commission stresses that the proposal "does not establish a new supra-national legal form for the single member company", but aims to progressively abolish "restrictions on freedom of establishment". It is therefore based on Article 50(2)(f) TFEU.

3. **Preliminary findings**

- 3.1 Experience in individual Member States has shown that in some sectors it is more attractive for individual businesses to commission an independent "Me PLC" than to hire someone as an employee. It is common for national collective bargaining agreements to be circumvented in this way. By making it easy to set up SUPs and at the same time limiting liability without requiring capital investment, and by allowing the separation of a company's registered office and administrative headquarters, the proposed directive provides further impetus for bogus self-employment. Moreover, this typically affects people who are in a weak position on the labour market and for whom the protection of labour law and collective bargaining agreements is particularly important.
- 3.2 The EESC recognises that the overwhelming majority of businesses and employees in the EU abide by the legal system that is applicable to them. However, on account of the SUP's design, the EESC believes that the proposed structure presents a potential risk of an increase in corporate fraud, other criminal activities (e.g. money laundering) or bogus self-employment. For example, persons would be able to choose or transfer their "virtual" registered office at will, and conceal their identity through a "Russian doll" structure extending throughout Europe. The draft directive thus runs counter to European efforts to combat money laundering.
- 3.3 There are question marks over whether the positive steps taken by the Commission to promote SMEs' cross-border activities will be successful with this draft directive. The EESC considers that some Member States previously called, in the negotiations on the European private company, for substantial minimum capital requirements, for the registered office and administrative headquarters to be required to be the same, and for common employee participation standards. In the EESC's view, the fact that the legitimate demands of those Member States have been disregarded in the draft directive is not useful.

4. Specific comments

4.1 Legal basis and scope

- 4.1.1 The Commission's aim, with the new proposal for a directive on single-member private limited liability companies, is effectively to introduce the European private company by a different route. The regulatory detail of the new legal form of SUP is basically identical to that envisaged for the European private company. Not only are SUPs to have a single European name, but also all their key characteristics (formation, minimum share capital, registered office, articles of association) are to be defined by supranational law. In substantive terms, SUPs must indeed be regarded as a supranational legal form, for which Article 352 TFEU would be the appropriate legal basis.
- 4.1.2 Even if ultimately there are to be 28 different SUPs under the SUP proposal, this does not mean that it is a national legal form. The SE also has 28 different forms and its supranational nature is not called into question. There should therefore be a large question mark over whether it was right for the Commission to use Article 50 TFEU as the legal basis for the proposal.
- 4.1.3 The Commission proposal is also not in line with the subsidiarity principle enshrined in the EU treaty, because unlike the SE or SCE it does not stipulate any cross-border requirements and is therefore designed not only for cross-border but also for purely national circumstances. This means that even those who intend to run their business exclusively in the domestic market would be able to set up a SUP ex nihilo. Converting a national legal form into a SUP without any cross-border connection would also be possible under the directive. Community law is therefore creating a new national company form, which is in direct competition with existing national legal forms. Regardless of the inconsistency with the subsidiarity principle, Article 50(2)(f) TFEU stipulates the requirement for sites in various Member States. It therefore calls for the status of SUP to be available only to companies that are active internationally and are operating in at least two Member States at the time of registration or can credibly demonstrate that they will be doing so at the latest within a specified time (two years, for example) of their registration. The Proposal for a European Foundation (EF)⁷ and the European Parliament's interim report on this could serve as a model here.
- 4.1.4 The Commission emphasises that the proposed directive would facilitate the cross-border activities of SMEs and the establishment of subsidiaries in other Member States. However, the Commission has neglected to limit the scope of the directive to ensure the intended support for SMEs. To ensure the proposed directive is favourable for SMEs, its scope should therefore be restricted to such companies. The Accounting Directive (2013/34/EU), which applies to all companies throughout the European Union, provides a suitable definition here⁸. Only companies which meet the criteria for size set out in Article 3(2)⁹ of Directive 2013/34/EU¹⁰ should be eligible to become SUPs. This would mean that when the SUP reaches a certain size, the company has to be turned into another

7 See footnote 4.

8 See footnote 3.

9 Such companies do not exceed the limits of at least two of the three following criteria on their balance sheet dates: balance sheet total: EUR 4 000 000; net turnover: EUR 8 000 000; average number of employees during the financial year: 50.

10 See footnote 3.

legal form. Given the disclosure requirements which companies have to meet, compliance with these criteria can easily be checked and monitored.

4.2 **Setting up companies online and minimum share capital**

4.2.1 The mandatory electronic registration procedure proposed by the Commission may contribute to the SUPs' lack of transparency if there is no requirement to check the company founder's identity. However, consultation on the rights and obligations associated with starting a business is also of vital importance to the company founder. It is difficult to verify a person's identity by electronic means. Online registration without identity check would also undermine the Commission's efforts to combat money laundering.

4.2.2 In the interests of SMEs, the EESC believes that establishing an "appropriate time frame" to set up a SUP is important. The Member States should be free to decide whether they wish to provide for SUP online registration. The electronic registration procedure should, however, entail a "preliminary check". In this way, the relevant authorities and/or notaries could, in particular, verify the identity of the company founder and inform them about important legal consequences.

4.2.3 Removing the minimum capital requirement while retaining limited liability of the shareholder suggests to company founders that the business risk will be borne by the public. This suggestion is false, and utterly contradicts free market principles. Minimum capital requirements are also very important as a credibility threshold, as they indicate to company founders that a substantial risk contribution is required in order to obtain limited liability, and thus that the opportunities and risks of a project need to be weighed up carefully. A substantial minimum share capital appropriate to a company's purpose is therefore an essential element of any company. A requirement to build reserves would also be an appropriate means of ensuring that companies have more capital, in the interests of preventing insolvency.

4.2.4 The EESC believes that a solvency statement from the director is no substitute for a substantial minimum capital and associated capital maintenance requirements, especially as the solvency statement is in any case fraught with uncertainty and the risk of an incorrect forecast is incurred by the creditor. The solvency statement should be signed by an independent, external auditor.

4.3 **Registered office**

4.3.1 The separation of the registered office and administrative headquarters means that SUPs could very easily evade any legal systems under which they in fact operate. Various examples show that this is at the expense of creditor and consumer protection but also employee participation, which can be easily circumvented in this way. A completely free choice of registered office without any connection to local activity also increases the risk of abuse, not least because it will be much easier to evade official oversight. The employee participation rights in a Member State in which a SUP carries out its main business activities must not be circumvented through the choice of a registered office in another Member State. There is also still no common European business register. It is therefore vital to improve this situation before considering further liberalisation.

4.3.2 Separation of a company's registered office and its central administration also makes it more difficult to pursue complaints, because it may be necessary to file the claim with the registered office, or because a legally awarded entitlement needs to be enforced in the country of registration. Past experience has shown that international service of documents remains difficult in spite of European regulations on the matter (Service of Documents Regulation, European Enforcement Order Regulation), which means that it takes much longer and is much more difficult to pursue claims before the courts and to enforce them. The Directive should therefore absolutely require a company's registered office to be the same as its central administration, in line with the requirement in EU law for European Companies (SEs) and European Cooperative Societies (SCEs).

4.4 **Employee participation and corporate governance**

4.4.1 Depending on the size of the business, a legal form that has the same name and the same key characteristics throughout the EU must also follow common EU-wide minimum standards with regard to the establishment of a supervisory body and employee participation. Common rules should therefore be laid down regarding the need to set up a supervisory body (supervisory board or non-executive directors) and regarding employee participation in the SUP (in the event of conversion, on the same lines as the European Company Regulation). Otherwise, the proposed directive will increase "forum shopping" and thus generate competition to weaken and dismantle national company-law standards and to circumvent employee participation requirements. Employee participation in the supervisory board is a cornerstone of the European social model and an element of European corporate governance, and must be protected from mechanisms to bypass it. In the interests of "company clarity", the name of every SUP should contain a reference to limitation of liability and the country in which it is registered.

Brussels, 10 September 2014.

The President
of the
European Economic and Social Committee

Henri Malosse
