



What are the main issues on which no consensus has been reached yet on the proposal for a SUP?

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What are the main issues on which no consensus has been reached yet on the proposal for a SUP? My opinion about those issues.

Abstract:

The Societas Unius Personae (SUP) proposal presented in April 2014 is one of the attempts of the European Commission to harmonize the law of the member states of the European Union in the field of Company Law.

Before, the Commission tried to achieve this goal by different instruments and lastly, in 2008, by presenting a proposal for a Statute on a European Private Company ("SPE").

SUP project is about creating an alternative measure which covers some parts of the issues addressed to the SPE but not all of them. It proposes some new solutions but the opinions on the subject are controversial.

Introduction:

The SUP pursues several goals but the main aim is to improve the business environment for all the companies (and SMEs particularly) by simplifying the process of creating a new legal entity, by reducing the costs of the creation and of the cross-border business infrastructure (for example, legal advices on the national company law of the Member States, registration fees, accounting costs). By encouraging the entrepreneurship, the Member States will contribute to the creation of new job opportunities and therefore reduce the unemployment by creating new work places but also by encouraging the unemployed persons to create a start-up.

Basically, the aim of the directive is to create a sort of cross-border passport for all European companies by having in the legal systems of all the member states a national company law form with the principles contained in SUP directive proposal.

In the memo on SUP project, published by the Commission, it talks about one other goal, which is just a sub goal: allow SMEs but also larger companies to set-up subsidiaries across the EU with the same requirements everywhere in EU (without going to the country, the parent company will be able to register a subsidiary online).

There were several opinions given on this proposal and the goal of this study is to make a point on these opinions, identify the controversial points, discuss and analyze *some of them*.

Methodology :

To undertake this study, I have read the proposal itself in order to understand its context, its content and main ideas.

I read the report of the Reflection Group of company law experts. I also had a chance to read some of the opinions submitted during the public consultation on the future of the European Company Law in February 2012, but especially the opinions given during the on-line public consultation on single-member companies in June 2013.

I would like to mention that the 2/3 of the participants were in favor of introducing a SUP in national legal order, mainly because of the low activity of SMEs in EU and that despite their potential. These readings helped me to understand the “what for” of this proposal, to understand why and how it was born.

The main part of my study is a study of the current doctrine developments on this topic (SUP project), some articles in legal journals and or books, opinions of the professionals and European associations.

I will omit the technical questions like for example the legal basis for such a directive , benefits/disadvantages of making a SUP a national company instead of European one, the choice of the instrument (a directive rather than a regulation).

Results:

Key elements of this proposal:

There will be a company legal form called SUP in each member state, in its national law. It will provide possibility for a company to register the company electronically, to have a uniform template of the articles of association (it means the same for all SUP in all EU), to have a very low level of minimum capital requirement (1 euro) and it has to provide rules which are protecting the creditors in a sufficient way.

The current status of negotiations process:

In September 2014 there was a negative opinion of EESC.

In May 2015 there was a compromise reached at the Council.

In June 2015 there was a negative opinion of the EP EMPL Committee.

In July 2015 the IMCO Committee presented a compromise opinion.

And currently the report on SUP proposal is at the EP JURI Committee.

Basically, all of the rules introduced in this proposal are being criticized :

The main issue is the possibility of **online registration of the companies.**

Member States will decide themselves how they prefer to organize this process but will have to *recognize* the registrations and the identification of UBO (Ultimate Beneficial Owner) and other important information assessment done in the another Member State (the principle of mutual recognition).

The Member States will be able to decide on the role of the *notary* in case of the online registration and of the paper one (N.B. : the proposal doesn't remove the possibility of the paper registration, it just obliges the Member States to provide for an alternative solution: the online registration).

This point is dangerous. In some countries the notary will then continue to exercise some control, even on online registration (for example, controlling the documents the company has put on the special registration website or even by being the owners of the companies registration website), while in other countries it will be possible to register the company online without any control nor intervention from the notaries (see Memo of the Commission).

Even if we suppose that there will be a compliance check-in of the new company exercised by the Member State in one or another way, the identification procedure can become more difficult for the authorities (difficult to verify that the identification documents that are provided correspond to the person who is actually incorporating the company) and can possibly lead to the amplification of money-laundering problems in Europe.

A solution would be to make this control in the bank, when the entrepreneur will come to make a deposit of the initial capital. But it is far from being ideal solution as presenting some other issues which I will not develop here.

There should be a sort of harmonization of the control requirements during the registration process to avoid having more or less strict legal systems in Member States and so to avoid the growth of Regulatory Competition in EU, which is already quite intensive. There need to be sufficient safeguards as to the verification of the UBO (here, in SUP, single shareholder) identity, on the European level. This is my opinion and also the one of Luc Hendrickx, Director Enterprise Policy and External Relations at UEAPME (the employers' organisation representing crafts, trades and SMEs from the EU and accession countries at European level).

As already mentioned, the fact that there will be a mutual recognition of registrations, will result in imposing one Member State with a high level of control to accept the company registered in another Member State with less control from the authorities.

The EESC (European Economic and Social Committee) also thinks that by registering the company online the future entrepreneur doesn't benefit from the advices on his rights and obligations which appear with the creation of the company. Moreover, it strengthens too the fact that the verification of the identity of the founder can be difficult in this perspective. The Council of the Notariats of the European Union (CNUE) is therefore totally against this proposal.

The online registration and the statutory seat versus real seat problem can lead to **tax evasion**: the entrepreneurs will set up "letterbox companies" – companies which registered in one country, have a mailing address there but conduct all their commercial activities or at least a big part of them in another country (so they keep a mailing address just to minimize the tax liability).

Creating a unique template for all the SUP seem to be a good idea but difficult to implement, according to Prof. Malberti Corrado.

The template of the articles of association will have sections about formation, shares, capital, organisation, accounts, dissolution of the SUP.

Let me remind you that SUP is supposed to become a national entity, governed mostly by the national law of the Member State in which it is formed. Therefore imposing a template means an attempt to draft a template which will fit the national legislation of all the Member States, which is

difficult if not impossible...

Moreover, Prof. Malberti Corrado thinks that the implementing act would have to be a regulation in order to ensure uniformity of the templates and of the legislation in general.

There are also some concerns about the protection of creditors.

It is necessary and very important as the capital of 1 euro is too low to repay the debts of the company in case of its liquidation.

This issue is mainly an economic/accounting issue therefore I share here the view of ACCA on this subject. ACCA (the Association of Chartered Certified Accountants) think that Member State should be allowed to oblige companies to build reserves, in order to have a sufficient protection of the creditors.

There are no provisions on employees' rights:

National law will govern the rules regarding the information, the consultation and the participation of the employees in the life of the company.

SUP could be then used to skirt the employees' rights. For example, by registering the company in a country where the employees' rights protection is low, but having its main activities in another country, in which national law is much more protective. As there will be a difference between the statutory seat and the real seat, it is possible that the company will be able to apply the law of the country in which it was registered and so – lower protection of employees' rights.

The EECC is also concerned about this issue and therefore pleads for introduction of uniform standards of employees' rights for a SUP.

Discussion of the findings : My personal opinion

Personally, I am a lot in favor of this proposal. I have been willing to create a start-up since already more than 2 years. I have a business idea, in legal field and the only thing which prevents me from becoming an entrepreneur is the capital requirement which is very high for a student.

Even taking into account all the issues I addressed in this paper, I still believe the transposition of this Directive in the Luxemburgish law will allow young people to realize their business ideas and create new work places in the future.

Regarding the solutions to the issues discussed in this paper:

I think that there should be a fuller harmonization of the online registration process, the identification, the role of notaries, etc.

There should be a precise provision on protection of the creditors.

Concerning the template the only solution would be to analyze the law of the Member States and try to regroup the legal systems in Company Law in several groups and then make one template per group. This way there will be one template for each of group of countries with approximatively the same law in this field.

Conclusion

The proposal of the SUP directive is a good idea but, in my opinion, it will not be accepted in the Parliament, for the same reasons that the other attempts of harmonization of European law, like

for example Contract Law (optional regulation for contract law) or SPE project. The disparities between the Member States are really big and I doubt that there will be a consensus reached on this matter.

The other reason of its possible failure in the European Parliament is that, as I have shown in this paper, there are still points to think about and to improve like for example adding some provisions regarding the protection of the creditors, harmonized rules on identification and verification of the founders of SUP.

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