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Societas Unius Personae

Is there a need for a new European company form?

Bachelor's thesis within Company Law

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Abstract

In 2008, the European Commission proposed a regulation for a new European private company, called the *Societas Privata Europea*. This proposal did not get unanimous approval and was therefore withdrawn after five years of attempt to find a compromise. In 2014, the European Commission proposed a directive on single-member private limited liability companies, called the *Societas Unius Personae*. The aims of the new proposal have a few similarities as the European private company, as will be mentioned in the introduction. However, the proposed directive introduces a few changes, which the European Commission hopes will make this proposal successful.

The purpose with this thesis is mainly to examine whether there is a need of a new European company form on the market today. The conclusion is taken by examining who would benefit the most with this company form.

This thesis contains an explanation of the proposed directive, a comparison between this new company form and the corresponding Swedish company, as well as opinions on this directive. In the end there is a discussion regarding this subject and lastly my conclusions.

The result has shown that there are still great amount of uncertainties that are in need of further discussion in order for this proposal to eventually pass unanimous consent. My conclusions are that there is not an urgent need of a new European company form on the market right now. However, it is a work in progress, and I believe a European company form like this one is a good way towards the aim of uniting the Member States of the European Union.

Preface

This thesis is an independent work by author Shilan Abosh.

I want to express my thanks to my tutor Jan Andersson, for all the feedback, guidance and support he has given me throughout this time. Thanks to my friends and to the members of my opposition group for feedback and for proofreading my work.

I also want to take this opportunity to thank Evelina Englund, legal adviser at the unit of real estate law and corporate law, Department of Justice, the Government Offices of Sweden, for providing me consultation responses that were inaccessible for me.

Lastly, I want to thank the librarians at the University of Jönköping for guiding me and providing with information on legal sources regarding the European Union.

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Appendix 1 Annex 1 Types of companies referred to in
Article 1(1)(a)

Abbreviations

AGM	Annual General Meeting
CEO	Chief Executive Officer
e.g.	<i>Exempli gratia</i> ; for example
ECJ	The European Court of Justice
EESC	European Economic and Social Committee
et al.	<i>Et alii</i> ; and others
etc.	<i>Et cetera</i> ; and so on
EU	European Union
EUR	Euro
i.e.	<i>Id est</i> ; that is
SCA	Swedish Companies Act, (2005:551) New Companies Act
SCE	European Cooperative Society
SE	Societas Europaea
SEK	Swedish Krona
SME	Small and Medium-sized Enterprises
SPE	Societas Privata Europaea
SUP	Societas Unius Personae
TEU	The Treaty on European Union
TFEU	The Treaty on the Functioning of the European Union

I Introduction

I.1 Background

On the 25th of June, 2008, the European Commission introduced a regulation for a new European company form called *Societas Privata Europaea*, hereinafter the SPE. The aim with this company form was to increase the small and medium-sized enterprises, competitiveness on the Single Market by simplifying their establishment and operation. Another goal of the SPE was to reduce the compliance cost that arise when creating and operating a business, and caused by the differences between the diverse national rules on formation and operation.¹

Nonetheless, finding a compromise for the Statute to be unanimously adopted was impossible. Understanding this, the European Commission withdrew its proposal after 5 years of discussion since no compromise was found. At the same time, the European Commission informed that there will be an alternative proposal which intends to solve some of the problems referred by in the SPE.² In April 2014, the European Commission presented a new proposal for a new company form; the single-member private limited liability companies, hereinafter referred to as SUP-companies. According to the explanatory memorandum of the proposal, the main reason for this directive is to help company founders, and especially small and medium-sized enterprises, to start their businesses in other Member States. Today, these companies would rather stick to their national company forms due to the costs that arise when establishing their business in a foreign country.³

I.2 Purpose

The purpose with this thesis is to investigate whether or not we need a new company form on the market. Will SUP reach the aims that are mentioned in the proposal and will it get a better outcome than the SPE-proposal?

¹ COM(2008) 396 final, Proposal for a Council Regulation on the Statute for a European private company, p 2.

² COM(2014) 212 final, Proposal for a Directive of the European Parliament and of the Council on single-member private limited liability companies, p 2.

³ COM(2014) 212 final, p 2.

Who benefits the most by the SUP proposal? Will SUP affect any company forms and eventually rule them out? How will this new company form affect the market? These questions are also subjects to this thesis.

This thesis will be written in a legal policy purpose point of view.

1.3 Delimitations

My main focus will be on the capital, the registration procedure and the organization, therefore only the main differences in these areas will be shown when comparing the SUP and the Swedish Private Company. There will thus not be any deeper presentation of the Swedish Private Company. There will, however, be more details about the SUP-proposal other than aforementioned.

Seeing that the SPE-proposal was withdrawn, its articles will not be presented in this thesis. This means there will be no deeper analysis of what SPE really is, but the problem with SPE will be mentioned and also a reflection of why it was not implemented.

I will only look at the Swedish Private Company to compare with the SUP-company. This because the Swedish Private Company is the only company form in Sweden that resembles with the SUP, because the Swedish Private Company can also have one owner. The result of only comparing the SUP with the Swedish Private Company means other countries company forms will be eliminated. There will, however, be other European company forms shortly mentioned to make a point.

Subjects such as taxes, accounting and auditing will also be excluded from this thesis. For this reason certain Swedish authorities' opinions in this area will not be used as a source of information.

1.4 Method & Materials

The SUP-proposal will be the main material for this thesis. The reason for this is because the proposal contains all the rules and information we need to know. There are not any literatures or many other documents about the SUP yet, seeing the proposal is relatively new.

The European Economic and Social Committee have given their opinion regarding the SUP-proposal and it will be used for this thesis because the European Economic and So-

cial Committee is a consultative body of the European Union.⁴ Unfortunately, there were no other opinions from other European institutions or bodies.

Some of Sweden's important authorities and organizations local to this area have given their opinion on the SUP-proposal and even they will be used for this thesis. Those authorities and organizations are the following. The Government Offices of Sweden, "Regeringskansliet", gives the governments opinion on whether they are interested in implementing this proposal in Sweden. Seeing Sweden is one of the Member States of the European Union that gives their opinion, we can see how they think regarding this subject. The opinion of the National Board of Trade, "Kommerskollegium", is used because this authority is responsible for matters concerning foreign trade, for instance. It is therefore interesting to see their opinion on the SUP-proposal. The Swedish Agency of Economic and Regional Growth, "Tillväxtverket", is a governmental authority which aims for regional growth. It is therefore of interest to see whether this authority believes the SUP will lead to growth on the market. The Confederation of Swedish Enterprise, "Svenskt Näringsliv", is the companies' representative in Sweden. This opinion is used to see the enterprise representatives' view of the SUP. The opinion of the Swedish Companies Registration Office, "Bolagsverket", is taken in consideration because it is the organization that registers new and existing companies, and therefore it is of importance to have their thoughts regarding this proposal. Lastly, the opinion of the Swedish Enforcement Authority, "Kronofogden", will be included. Their opinion is of importance seeing this authority handles issues concerning insolvency and bankruptcy, and these matters would cause this authority to get involved. I got some of these opinions from the internet by searching on different pages and some, after request, mailed to me by Evelina Englund, legal adviser at the Government Offices of Sweden.

Other materials used and referred to is literature on the SPE which is used for the discussion of the SPE-proposal and the SUP-proposal. Literature about the Swedish Private Company is used when comparing the SUP and the Swedish Private Company. Lastly, some internet sites are used for diverse information.

The European Commission will be referred to as the Commission throughout the thesis. When mentioning the proposal, the suggested SUP-proposal⁵ is meant unless anything else

⁴ European Economic and Social Committee, *The Committee*, <http://www.eesc.europa.eu/?i=portal.en.the-committee>, downloaded 2015-04-27.

⁵ COM (2014) 212 final.

is stated. The same regarding the directive; unless specified what other directive is meant, it is referred to the SUP-directive. Other abbreviations or shortening of names are explained in the text and in the abbreviation list.

When the Swedish Private Company is mentioned, the private limited liability company “*Aktiebolag*” is meant throughout the paper.

1.5 Outline

This thesis describes the reason there is a proposal for a new European company form and what this company form is aimed to achieve. Most important will be to show if SUP is needed, who will benefit from it and if it affects any other company forms.

Chapter 2 will give an introduction to the legal basis of the SUP, presentation to what SUP is, who can set-up this company and how to establish it. What will it cost to establish the company?

Chapter 3 gives a deeper description of SUP and then a comparison between SUP and the Swedish Private Company. This chapter will show the main differences regarding the capital, the registration procedure and the organization of these two companies.

Chapter 4 consists of authorities’ opinions and a conclusion of the opinions in the end. What are the opinions? Is it a good proposal or is it a bad one? How and why?

Chapter 5 consists of a discussion, first about the different legal forms and which of them are most suitable for the SUP. After that there is a discussion about the SPE, and lastly a discussion about the SUP-proposal.

In chapter 6 I give my conclusions regarding this subject.

2 What is SUP?

2.1 The Principle of Subsidiarity

To understand whether or not the proposal is in accordance with the principle of subsidiarity, the Commission gives the following explanation. The meaning of the principle of subsidiarity is stated in the Treaty on European Union, hereinafter referred as the TEU. The TEU provides that the European Union, hereinafter the EU, should only act where the problem is better solved on EU level rather than at Member States level.⁶

The subject of reducing the set up costs of businesses has not yet been a matter at EU level. Whereas some Member States have individually tried to solve this problem, the results have remained different. A theoretically possible way to solve this would be to let the Member States individually introduce, in their national legal systems, a specific national company law form identically for all the Member States, but even this seems remote.⁷

The Commission gives that the Member States usually target their specific national rules rather than favor the cross-border establishment. An example of this is, for instance, the requirement to physically attend before an authority of the Member State for registration, which obviously have different influence on residents and non-residents, even though it is not a direct discriminatory action. Because of this, foreigners will presumably pay more than the domestic founders, seeing they have to travel to another state to register. Even the online registrations, which are available to nationals or residents alone, cause increased costs for foreigners.⁸

The Commission indicates, because of the above mentioned, if there are no measures taken on EU level, there will only remain non-harmonized national settlements. Also, small and medium-sized enterprises, hereinafter referred as SMEs, will keep encounter difficulties as to extend their businesses abroad. Especially the costs that arise would affect the foreign founders. In theory, if each Member State acts individually to take the measures appropriate to solve this problem, the end result would be the same as the simple way of harmo-

⁶ Consolidated version of the Treaty on European Union [2012] OJ C 326/13, TEU, Article 5.

⁷ COM(2014) 212 final, p 5.

⁸ COM(2014) 212 final, p 5 f.

nized rules, but as it has shown it is improbable. The Commission therefore finds that this EU interference does in fact conform to the principle of subsidiarity.⁹

2.2 The Principle of Proportionality

The meaning of the principle of proportionality is that the EU shall only take the measures necessary to achieve the objectives of the Treaties.¹⁰

To make it easier for SMEs to carry out a greater cross-border activity in the Internal Market, it is convenient that the terms of the set up and the operation of single-member limited liability companies are harmonized. It is believed that this would ease and also encourage companies to set up businesses and that it will lead to a growth of subsidiaries in the EU. Since the proposed directive will not be harmonized in whole, only the most important regulations in the area considering cross-border activity will be harmonized, it will not go beyond what is necessary to achieve the objective.¹¹

The directive will also ensure that the meaning and composition of the proposed EU action will be proportionate and does not transcend what is necessary in order to attain the regulatory purpose.¹²

2.3 Legal basis

Article 50 of the Treaty on the Functioning of the European Union, hereinafter referred to as the TFEU, is the legal basis for the EU competence to act in the area of company law. It is specifically Article 50(2)(f) TFEU that is of importance to this matter. This article aims to progressively abolish the restrictions on freedom of establishment regarding the establishment of subsidiaries.¹³

According to the Commission, the aim of this proposal is not to create a new supra-national legal form for the single-member companies, but as stated in the article, to progressively abolish the restrictions on the freedom of establishment as to set up subsidiaries in different Member States. As mentioned above, if the Member States independently adopted identical laws, the aim of the proposal could have been solved. This is the reason

⁹ COM(2014) 212 final, p 6.

¹⁰ TEU Article 5.

¹¹ COM(2014) 212 final, p 6.

¹² COM(2014) 212 final, p 6.

¹³ COM(2014) 212 final, p 5.

why article 50 TFEU contributes with enough legal basis for the proposal, and Article 352 TFEU is therefore not vital in this matter.¹⁴

2.4 The SUP

Societas Unius Personae, hereinafter referred as the SUP, is a new company form proposed by the European Commission, after the withdrawal of the SPE-proposal. The intention with the SUP is to reduce costs and make it easier to set-up a business in other Member State.¹⁵

It is thought that the proposal will assist the progress of cross-border activities of companies, this by having the Member States to adopt, in their national legal system, a new national company form that will follow the same rules in all the Member States. It will be given the name *Societas Unius Personae* wherever it is established and will have the same abbreviation, SUP, throughout the EU.¹⁶

There will be a harmonized registration procedure that will reduce the set-up and operational costs. The registration procedure will be done online and there will be standardized template of articles of association available. There will also be a low capital requirement to set up a SUP-company.¹⁷ The minimum capital required will be 1 EUR, or at least one unit of the national currency.¹⁸

A SUP company may be set up by either a natural or a legal person.¹⁹ The national rules for private limited liability companies will regulate the process of forming a SUP. There will only be two ways of setting up a SUP company; either by establishing a company *ex nihilo*²⁰ or converting an already existing private limited liability company to a SUP-company. The companies in Annex 1 of the SUP-proposal²¹ are allowed to be converted to a SUP-company.²²

In the proposal, it is suggested that the Member States should not make it a necessity for the location of the SUPs registered office and the central administration to be in the same Member State. This is to guarantee that the companies take full advantage of the Internal

¹⁴ COM(2014) 212 final, p 5.

¹⁵ COM(2014) 212 final, p 2 f.

¹⁶ COM(2014) 212 final, p 3.

¹⁷ COM(2014) 212 final, p 3.

¹⁸ COM(2014) 212 final, Article 16.

¹⁹ COM(2014) 212 final, Article 8.

²⁰ *Ex nihilo* means founding an entirely new company, as explained in COM(2014) 212 final, p 6.

²¹ See appendix 1.

²² COM(2014) 212 final, p 6 f and Article 9.

Market.²³ The SUPs registered office and either its central administration or its principal place of business must however be in the EU.²⁴

²³ COM(2014) 212 final, p 3.

²⁴ COM(2014) 212 final, Article 10.

3 Comparison between the SUP-company and the Swedish Private Company

3.1 Capital requirement

To incorporate a Swedish Private Company, a minimum capital of 50 000 SEK or an equivalent amount of money in the currency of EUR, is required.²⁵ For the SUP-company, however, a minimum capital of 1 EUR or at least one unit of the national currency is required.²⁶

3.2 The registration procedure

3.2.1 The Swedish Private Company

The Swedish Private Company can be set-up by one or more natural or legal persons, also known as founders.²⁷ In the (2005:551) New Companies Act²⁸, hereinafter referred to as SCA 2005, it provides that the first step is to create a draft of a memorandum which shall give the information about, for instance, the subscription price, information about the company's functionaries and a draft of an Article of Association.²⁹ The Article of Association shall contain information about the company, as stated in a list of rules in the SCA 2005.³⁰

The second step is to have one or more of the founders to subscribe all the shares. This is done in the memorandum and is only binding towards the subscriber when all of the founders have signed the memorandum.³¹ A share can have more than one owner, but in that case those owners must agree on one common representative of the share to exercise the rights towards the company when needed.³²

²⁵ (2005:551) New Companies Act, chapter 1 § 5 paragraph 1 and 2.

²⁶ COM(2014) 212 final, Article 16.1.

²⁷ SCA 2005, chapter 2 § 1.

²⁸ Bolagsverket, *The new Swedish Companies Act* <http://www.bolagsverket.se/en/us/about/news/2006/swedish-1.7190>, downloaded 2015-03-24, publ 2006-01-02.

²⁹ SCA 2005, chapter 2 § 5 paragraph 1 & chapter 2 § 10.

³⁰ SCA 2005, chapter 3 § 1.

³¹ SCA 2005, chapter 2 § 12.

³² SCA 2005, chapter 4 § 42.

When this is done, the shares shall be paid. The payment for one share shall not be less than the par value and the shares shall be paid in either money to a bank account or be paid in capital contributed in kind.³³

After that, the memorandum shall be dated and signed. The board of directors shall then announce the company for registration.³⁴ The registration of the company can be done either online or using a form. When registering the company a fee shall be paid.³⁵ The announcement shall be done within six months from the date written in the memorandum.³⁶

The Swedish Private Company is considered established when the memorandum has been signed by all founders and only if the registration of the company was done in the given time.³⁷ The company acquires rights and undertakes obligations when the company is considered as registered.³⁸

3.2.2 SUP-company

A SUP-company may be established by a natural or legal person, similarly as the Swedish Private Company.³⁹ Where one share in a Swedish Private Company can have more than one owner⁴⁰, the meaning of the SUP, a single-member company, is a company whose shares are held by one single person.⁴¹ The SUP can only issue one share and it cannot be split.⁴²

For the Member States to register the SUP, they may require the information or documentation stated in the exhaustive list provided in the article.⁴³ The SUP is allowed to change documents and details in correspondence with the procedure stated by the national law.⁴⁴ When registering a SUP in the registers of the Member States, a template provided by the Commission shall be used for that procedure.⁴⁵

³³ SCA 2005, chapter 2 §§ 15-17.

³⁴ SCA 2005, chapter 2 § 22.

³⁵ Bolagsverket, *Starta aktiebolag*, <http://www.bolagsverket.se/ff/foretagsformer/aktiebolag/starta>, downloaded 2015-04-27, publ 2014-08-14.

³⁶ SCA 2005, chapter 2 § 22.

³⁷ SCA 2005, chapter 2 § 4.

³⁸ SCA 2005, chapter 2 § 25.

³⁹ COM(2014) 212 final, Article 8.

⁴⁰ SCA 2005, chapter 4 § 42.

⁴¹ COM(2014) 212 final, Article 2 (1).

⁴² COM(2014) 212 final, Article 15.1.

⁴³ COM(2014) 212 final, Article 13.

⁴⁴ COM(2014) 212 final, p 7.

⁴⁵ COM(2014) 212 final, Article 13.2.

The SUP shall be registered in the Member State where it will have its registered office.⁴⁶ As mentioned above, the registration procedure for a SUP will be completely electronically and it will therefore not be necessary for a founder to be present before an authority in the Member State of registration.⁴⁷ Every Member State shall provide for the two templates necessary for the registration as provided in the articles.⁴⁸ The Member State shall also provide for a national online registration website, and on that website, a reference to other Member States' corresponding online registration websites.⁴⁹ When all the forms have been filled and sent to registration, the founder shall receive a certificate of registration, issued within three working days by the Member State, which approves the fact that the registration procedure has been completed.⁵⁰

The Member States are permitted to set rules, on national level, for the verification of the identity of the founder and of the agent representing the founder. The Member State may also set rules for the eligibility of the documents and the information's provided for the registration authority. In case another Member State issues identification, whether it is by an authority or electronically, it shall be accepted in the Member State of registration for the purpose of verification.⁵¹ The Member States shall not demand any sort of license or authorization for the registration of the SUP. All documents regarding the registration process shall be published in the register of companies directly after registration.⁵²

The SUP-company will obtain legal personality the day it is registered in the register of companies in the Member State of registration.⁵³

3.3 Organization

3.3.1 The Swedish Private Company

The Swedish Private Company consists of four leading bodies; the shareholders, the board of directors, the managing directors and the accountant.⁵⁴ The last will be left out in the following.

⁴⁶ COM(2014) 212 final, Article 14.1.

⁴⁷ COM(2014) 212 final, Article 14.3

⁴⁸ COM(2014) 212 final, Article 14.4 (a) & (b), Article 11 and Article 13.

⁴⁹ COM(2014) 212 final, Article 14.4.

⁵⁰ COM(2014) 212 final, Article 14.4. paragraph 2.

⁵¹ COM(2014) 212 final, Article 14.5.

⁵² COM(2014) 212 final, Article 14.6.

⁵³ COM(2014) 212 final, Article 14.2.

⁵⁴ Sandström, Torsten, *Svensk aktiebolagsrätt*, 5e uppl, Norstedts Juridik, Stockholm, 2015, p 178 f.

The shareholders, acting in their annual general meeting⁵⁵, hereinafter referred to as the AGM, is the highest decision-making body of the Swedish Private Company.⁵⁶ The AGM is held at least once a year where they make their decisions.⁵⁷ At the AGM, strategic decisions regarding the board of directors are taken and the Article of Association is determined.⁵⁸

The board of directors⁵⁹ is the second highest decision-making body and the highest executive body. It decides regarding e.g. the company's personal organization, the accounting, the company's business focus etc. The board of directors shall appoint a chief executive officer, CEO, to manage the company, otherwise the body's main functions are controlling.⁶⁰ A legal person cannot become a board member.⁶¹

The CEO⁶² is the body for current decisions and current enforcement. It handles the daily ongoing management of the company concerning the organization, the accounting and the business activity.⁶³ The CEOs term of office have effect from the day the notification of registration comes to the Swedish Companies Registration Office or on the decided date.⁶⁴

3.3.2 SUP-company

The single-member of the SUP shall take decisions which shall be written and recorded by the single-member himself. These documents shall be saved for at least five years.⁶⁵

For the management of the SUP there shall be one or more directors, in terms of a management body and in the Articles of Association the number of directors shall be specified. All the powers of the SUP may be exercised by the management body unless they are exercised by the single-member or in some cases by the supervisory board. The directors shall be natural persons. Where national law allows it, the directors may be legal persons. The directors shall be appointed for an unlimited period of time, except when stated differently in the Articles of Association. The single-member may decide on a different period of time the director shall be appointed, but also decisions concerning removing a director at any

⁵⁵ SCA 2005, chapter 7.

⁵⁶ Sandström, *Svensk aktiebolagsrätt*, 2015, p 179.

⁵⁷ SCA 2005, chapter 7 § 10.

⁵⁸ Sandström, *Svensk aktiebolagsrätt*, 2015, p 178 f.

⁵⁹ SCA 2005, chapter 8 § 1.

⁶⁰ Sandström, *Svensk aktiebolagsrätt*, 2015, p 179.

⁶¹ SCA 2005, chapter 8 § 10.

⁶² SCA 2005, chapter 8 § 27 & § 29.

⁶³ Sandström, *Svensk aktiebolagsrätt*, 2015, p 179.

⁶⁴ SCA 2005, chapter 8 § 33.

⁶⁵ COM(2014) 212 final, Article 21.1.

time. A director shall immediately be removed from the authority and power to represent the SUP as a director, when the decision of being removed of the office has been announced. Rights and obligations under national law will not be affected by this decision.⁶⁶

In case there is not any directors formally designated, but there is a person whose directions and instructions are usually followed, this person shall be considered to be a director regarding all the work and liabilities within the exercise of a director's profession. A person, who gives advices in a professional capacity to the management body, is not considered to be a director only because the body acts on those advises.⁶⁷

3.4 Summary of the comparison

To summarize this chapter, what is said about the minimum capital requirement, it is obvious that the SUP-company will be cheaper to set-up, seeing it only requires 1 EUR, or at least one unit of the national currency. This means it will only cost 1 SEK to set-up a SUP-company in Sweden compared to the Swedish Private Company and its set-up cost of 50 000 SEK.

The registration procedure on the other hand, is a bit harder to distinguish which one is easier. The aim with the SUP is to ease the registration procedure by registering the company online. The Swedish Companies Registration Office provides two options to register a company; either by filling a paper form or by filling the form online. This means there is not really any differences in the registration procedure in the means of how to register a company, seeing both company forms provide online registration. But if the SUP does not provide both ways to register, like the Swedish company form, then the Swedish Private Company benefits in this matter.

Also concerning the organization of the two companies, there is no clear distinctions seeing these companies differ from each other. The SUP has two, alternatively three⁶⁸, bodies; the single-member; which is the decision maker of the company, the management body; which exercises all the powers that are excluded from the single-members work, and in some cases the supervisory board. The Swedish Private Company, on the other hand, has a slightly more complicated organizational structure. It consists of four leading bodies, of which three will be discussed in the following. The first body is the shareholders acting in

⁶⁶ COM(2014) 212 final, Article 22.

⁶⁷ COM(2014) 212 final, Article 22.

⁶⁸ As mentioned above, there is a supervisory board in some cases.

their AGM and is the highest decision making body of the company. The Board of Directors, is the second highest decision making body and the highest executive body. The CEO is the third body and is the body for current decisions and current enforcement, handling the daily ongoing management of the company. To summarize this, one can say that the SUP has one decision making body while the Swedish Private company, in a way, has three decision making bodies.

4 SUP – advantages and disadvantages

4.1 Opinion of the European Economic and Social Committee

The European Economic and Social Committee, EESC, is overall positive to a proposal that will make it easier for SMEs, to start businesses cross-border. However, the EESC finds that this proposal⁶⁹ is still in need of additional development. The EESC has therefore given their opinion and recommendation on what to change and emphasizes the Commission to apply them.⁷⁰

The first remark the EESC make in their conclusions and recommendations is regarding the choice of legal basis which the Commission set out as Article 50 TFEU. The EESC considers that the use of this article is a way to evade the requirement for unanimity in the Council of the European Union. According to the EESC, the reason for this circumvention is to make sure the SUP-proposal does not fail as the recent proposal, namely the SPE-proposal. Consequently, as the EESC interprets the characteristics of the company form to obviously be regarded as supranational, the EESC recommends that the legal basis should be Article 352 TFEU.⁷¹

As mentioned, the EESC is positive about ways that ease for SMEs to establish companies. However, the EESC does not find that having a minimum capital requirement for a SUP-company set to a low amount as 1 EUR, or equivalent, nor to prohibit the requirement for the company to build reserves, to be anything but an easy way to create a “‘free’ limitation of liability”, as the EESC states. The effect of this might be that the market parties want to reassure the third parties, such as consumers, suppliers and creditors, by demanding personal guarantees from the business owners. This will, according to the EESC, nullify the advantages of the limited liability.⁷²

According to the EESC, it is of great importance to create healthy companies. To be able to do this, the minimum share capital shall be suitable to the company’s purpose, as some sort of ‘credibility threshold’, with the intention to protect the interests of certain parties, such as the creditors, consumers, employees and also the general public, and to prevent

⁶⁹ COM(2014) 212 final.

⁷⁰ OJ C 458, 19.12.2014, 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’, p 1.

⁷¹ OJ C 458, 19.12.2014, p 1.

⁷² OJ C 458, 19.12.2014, p 1.

jeopardizing the business. The EESC also finds, to create clarity regarding the company form, it is recommended that the name of the SUP should include a reference to the limitation of liability as well as the country of registration.⁷³

The EESC is furthermore negative to the so called letter boxes, i.e. companies which register their business in one state while carry their business activities in another state. The fact that a SUP-proposal sets a precedent by making a clear difference between the registered office of a company and its administrative headquarter, worries the EESC. This is because, by following the national law of the state in which the company is registered, it may threaten the employees' participation rights and facilitate the evasion of the national tax law. The EESC means that by moving the company's registered office, the employees' participation rights could weaken. The solution is to have a one single registered office and administrative headquarters. As comparison, the EESC refers to some other European legal forms⁷⁴. Also the employees' participation rights shall be ensured in the Member State in which the SUP-company operates its primary business activities. In accordance with this, the EESC finds that uniform rules for employee participation rights are needed for the SUP.⁷⁵

While the EESC states, seeing from the founders perspective, the least time possible to establishing a company is of great importance, one should still bear in mind that even though a completely online registration procedure might help reduce the time, it might also lead to some problems. For example, if the identity of the registrar is not being checked in connection with the registration procedure, it might lead to less honesty towards the business partners, weaken the credibility of the legal transaction and harm consumer interests, and lead to more "letterbox" companies. If the SUP-directive still would choose to provide the online registration, it should be, according to the EESC, a choice to be made by each Member State whether or not to have this kind of registration alternative. The identity check should in that case occur.⁷⁶

The EESC believes, for the SUP-directive to be available only for the SMEs, the directive should be restricted to such companies. This can be achieved only if companies that meet certain criteria⁷⁷ will be given accessibility to the SUP. The effect of this would be that the

⁷³ OJ C 458, 19.12.2014, p 2.

⁷⁴ Such as the European Company (SE) and the European Cooperative Society (SCE).

⁷⁵ OJ C 458, 19.12.2014, p 2.

⁷⁶ OJ C 458, 19.12.2014, p 2.

⁷⁷ Criteria's set out in the Accounting Directive. Directive 2013/34/EU, of the European Parliament and of the Council, of 26 June 2013, on the annual financial statements, consolidated financial statements and re-

SUP-company will have to convert into another company form as it reaches a particular size.⁷⁸

Lastly, the EESC underlines in case of adoption of the proposed SUP-directive, some Member States' national principles of company law for limited liability companies will be questioned. The EESC is also among those who question the proposals compatibility with the principle of subsidiarity regarding the legal basis. The EESC therefore suggests that companies that are internationally active and running their business in at least two Member States when registering the SUP, or can prove that it will happen within a certain time of their registration, the SUP shall be available to only them.⁷⁹

In conclusion, the EESC is positive to help ease for the SMEs in this legal area, but believes the proposed SUP-directive is in great need of discussion, and the EESC finds that it can only support the proposal if the abovementioned recommendations are followed.⁸⁰

4.2 Swedish authorities' opinions

4.2.1 The opinion of the Government Offices of Sweden (Regeringskansliet)

The preliminary Swedish opinion on the SUP-proposal is that the Swedish Government is positive to any measures with intentions to facilitate for persons to establish and run businesses on the internal market. Accordingly, it is the opinion of the Government Offices of Sweden that Sweden should consent to the intentions of the proposal.⁸¹

There are however a couple of ambiguities in the proposal that the Swedish Government considers needs to be clarified, and these are e.g. when the national legislation can and should be used before the SUP-directive, but also the possible influence the SUP-directive will have on each Member States' national labor market model. The Swedish Government also expects that there will be no room for circumvention of the rules that aim to protect the creditors, and that these rules therefore will be formed in a suitable way. A deeper anal-

lated reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC, Article 3 (2).

⁷⁸ OJ C 458, 19.12.2014, p 2.

⁷⁹ OJ C 458, 19.12.2014, p 2.

⁸⁰ OJ C 458, 19.12.2014, p 3.

⁸¹ 2013/14:FPM82, Regeringskansliets Faktapromemoria om Direktiv om privata enmansbolag (SUP-bolag), p 4.

ysis of the rules in the proposal considering capital protection is required. Also the rights of workers influence needs to be ensured to not be affected negatively by the proposal.⁸²

The Commission's right to decide on the templates for registration, the Article of Association and the conversion from a single-member company to a SUP-company are some of the difficulties the Swedish Government finds with this proposal.⁸³

The use of article 50 TFEU as a legal basis for this proposal, which is the same legal basis as for the directive 2009/102 on single-member companies, is uncertain to use in this context seeing the SUP is a different company form. Therefore the government finds that a deeper analysis is needed on whether or not the article 50 TFEU is a suitable legal basis.⁸⁴

The Swedish Governments opinion on whether the proposed directive is compatible with the principles of subsidiarity and proportionality is that it is in fact consistent. The reason for this is that the Government considers the aim to remove national barriers and limits for the establishment of single-member companies is better achieved at union level rather than on national level. The Government also acknowledges the Commissions assessment that the proposal does not go beyond what is necessary to achieve the objective.⁸⁵

4.2.2 The opinion of the National Board of Trade (Kommerskollegium)

The National Board of Trade, hereinafter referred to as the Board, is a Swedish authority responsible for matters concerning foreign trade, the Internal Market and trade policy, working to encourage an open and free trade with distinct rules. Their aims are to contribute to a well functioning Internal Market, an external trade policy in EU based on free trade, and an open and strong versatile trading system.⁸⁶

The Board is in general positive to actions that might ease for the single-member companies to establish themselves on the Internal Market, by making it easier and cheaper than currently is the case. The Board believes that this could lead to future growth of SMEs.⁸⁷

⁸² 2013/14:FPM82, p 4.

⁸³ 2013/14:FPM82, p 5.

⁸⁴ 2013/14:FPM82, p 5.

⁸⁵ 2013/14:FPM82, p 6.

⁸⁶ Kommerskollegium, *Om Kommerskollegium*, <http://www.kommers.se/om-oss/>, downloaded 2015-04-24.

⁸⁷ Dnr 4.1.1-2014/00808-2, Yttrande: Inbjudan att lämna synpunkter på Europeiska kommissionens förslag till direktiv om enmansbolag, Kommerskollegium.

4.2.3 The opinion of the Swedish Agency for Economic and Regional Growth (*Tillväxtverket*)

The Swedish Agency for Economic and Regional Growth, hereinafter referred to as the Agency, is a governmental authority organized under the Ministry of Enterprise and Innovation, with the mission to promote sustainable business development and regional growth, as well as to enforce structural fund programs.⁸⁸

The Agency is overall positive with the aim of the proposed directive, which they believe will lead to increased growth and employment. However, the Agency finds some uncertainties regarding the directives connection to existing national legislation, e.g. within Company Law; the current company forms, and within Common Law; the personal responsibility and the protection of creditors. For these reasons, the Agency advises a deeper analysis regarding the actual affect the proposal will have on Swedish legislation. The Agency is specifically underlining the importance of the creditor protection, seeing the importance of a company's opportunities to access external capital.⁸⁹

4.2.4 The opinion of the Confederation of Swedish Enterprise (*Svenskt Näringsliv*)

The Confederation of Swedish Enterprise, the Confederation in the following, is the companies' representative in Sweden. Their long-term goal is to reclaim a leading position in the international prosperity league. The Confederation believes that a great business environment is fundamental for the enterprises' growth and employment, and is needed to achieve this goal.⁹⁰

The Confederation gives the following preliminary opinion on the proposal. In contrast with the SPE, the SUP will not become an independent European company form, but the SUP will be a national company form with harmonized requirement. The Confederation comprehends the proposed directive as if it is up to each Member State to choose how to implement the SUP into the national legislation, whether it will become a new company form besides the existing, or be the only possible national company form for single-

⁸⁸ Tillväxtverket, *Vårt uppdrag*, <http://www.tillvaxtverket.se/huvudmeny/omtillvaxtverket/vartuppdrag.4.727874b114bb71d3df18a234.html>, downloaded 2015-04-24, updated 2015-03-24 15:35.

⁸⁹ Dnr 1.3.1-2014-1737, Yttrande: Inbjudan att lämna synpunkter på Europeiska kommissionens förslag till direktiv om enmansbolag, Tillväxtverket.

⁹⁰ Svenskt Näringsliv, *Om Svenskt Näringsliv*, http://www.svensktnaringsliv.se/om_oss/, downloaded 2015-04-25.

member companies. According to the Confederation, Sweden shall pick the first alternative, i.e. a new company form besides the already existing ones. This alternative will mean great flexibility for companies and shareholders and will be a possible way for them to best match the company's business idea when setting up a new subsidiary.⁹¹

However, the Confederation finds that the abbreviation SUP is not appropriate in Sweden, seeing "SUP" is a Swedish word. The Confederation means, the result of using this abbreviation for Swedish companies will be that these companies may be considered as less serious. The Confederation therefore suggests that another abbreviation shall be chosen.

4.2.5 The opinion of the Swedish Companies Registration Office (*Bolagsverket*)

The general opinion of the Swedish Companies Registration Office, hereinafter referred to as the Registration Office, is they are positive to the fact that the Commission is aiming to simplify and facilitate single-member companies' to work cross-border and to a bigger extent throughout the EU than the case is today. However, the Registration Office doubts that the proposed SUP will have the effect intended.⁹²

The reason for this opinion is the following. Firstly, the Registration Office believes that the new company form, SUP, could contribute to more business owners establishing themselves in other Member State, seeing how difficult it is for an individual businessman to establish a business abroad. Choosing the right company form is of great importance, yet it is only one of several elements that will form the basis for a cross-border establishment and is therefore not the main determining aspect whether an individual businessman will establish a business in another Member State. According to the Registration Office, there are many other more important aspects that are affecting a businessman's decision of a possible cross-border establishment.⁹³

Another problem that could be faced with this proposal is that a lot of resources would be required to be put on legislative work and marketing for the SUP, both at national level but also at European level. The Registration Office does not believe that this consumption of

⁹¹ Remissvar: EU-kommissionens förslag till direktiv om enmansbolag, COM(2014) 212, Svenskt Näringsliv.

⁹² AD 741/2014, Yttrande: Synpunkter på Europeiska kommissionens förslag till direktiv om enmansbolag, Bolagsverket, p 1.

⁹³ AD 741/2014, p 1.

resources will measure up to the eventual positive effects that this proposal is intended to result in.⁹⁴

The Registration Office also points out in their opinion, the little interest the SE-company received and that it should be kept in mind. Even though the SE-company is somewhat a bigger company form than the SUP, the Registration Office underlines the lack of interest is a sign of low demand for companies for cross-border purposes.⁹⁵

The proposal suggests only one shareholder for the SUP, which the Registration Office believes will be a problem, seeing in Sweden there is no official register for shareholders. To find out who owns a share in a company one can find this information, according to the Swedish law in the area, in each and every company's share register which is written by the board. The proposal suggest that the system of keeping a share register will be the foundation for whether the company meets the requirement of having one shareholder, which the Registration Office does not consider is a good solution seeing how the share registers usually have great flaws. The Registration Office therefore believes there will arise difficulties during the registration concerning whether a company fulfills the requirements of having one shareholder. This problem will arise both for new companies but also for the already existing limited liability companies that want to transform to a SUP-company. One solution is a procedure with the affirmation of the share ownership, but the Registration Office does not believe this way is reassuring enough to show how many shareholders certain companies have.⁹⁶

The Registration Office is hesitant about the fact that the minimum capital required will only be 1 EUR, or at least one unit of the national currency. This is because the authority considers the share capital as an evidence of seriousness in connection with establishing a company. The capital of 1 EUR will therefore contribute to a greater uncertainty among the company's creditors. This will then lead to higher costs for financial transactions and a lower access to venture capital. The Registration Office believes that the low capital requirement will lead to other higher costs for the company.⁹⁷

In the Registration Offices' understanding, the SUP-company can act both cross-border and on national level. This will lead to the circumvention of the minimum capital require-

⁹⁴ AD 741/2014, p 1.

⁹⁵ AD 741/2014, p 1.

⁹⁶ AD 741/2014, p 2.

⁹⁷ AD 741/2014, p 2.

ment of the national company form instead of operating cross-border. Even the ease of setting up a SUP will attract dishonest agents for dishonest purposes with the company.⁹⁸

SUP-companies which are registered in Sweden, shall, in case of litigation, respond to them in Sweden, according to the Registration Office.⁹⁹

The Registration Office is in general positive to the online registration procedure. The reason is there is a similar procedure in Sweden already and the Registration Office finds that this sort of procedures leads to increased safety and by that a reduced risk for crime.¹⁰⁰

4.2.6 The opinion of the Swedish Enforcement Authority (*Kronofogden*)

The Swedish Enforcement Authority, further called the Authority, is generally positive to actions that simplify for persons that are interested to operate serious businesses on the Internal Market.¹⁰¹

According to the proposal, the minimum capital required will be 1 SEK, or equivalent, and the owner is not liable for more than that amount. Persons with dishonest intentions will be drawn to this sort of company because the setting up of a SUP-company is quite easy and rather anonymous due to the online procedure. This is why the Authority finds that the SUP-company will most likely be used for non-serious and criminal activities.¹⁰²

The solution for preventing these kinds of dishonest activities, e.g. the suggested creditor protection, solvency certificate or restrictions to dividend to owners, which are presented in the proposal, is not, according to the Authority, enough to prevent potential abuse of the suggested SUP-company. Also, due to the ease to set-up a SUP-company, the Authority believes there is a high risk for the owner to have more debt burden than what is the case for other company forms. In consequence, the Authority finds it necessary of a deeper analysis concerning these matters.¹⁰³

⁹⁸ AD 741/2014, p 3.

⁹⁹ AD 741/2014, p 3.

¹⁰⁰ AD 741/2014, p 4.

¹⁰¹ Dnr 830-12802-14/112, Yttrande: Synpunkter på Europeiska kommissionens förslag till direktiv om enmansbolag, Kronofogden.

¹⁰² Dnr 830-12802-14/112.

¹⁰³ Dnr 830-12802-14/112.

4.3 Summary of the opinions

The conclusion of the above mentioned opinions are that the majority is positive to actions that will ease and simplify for SMEs to operate cross-border and establish themselves on the Internal Market. Some opinions have also been that the SUP will lead to flexibility, employment and future growth for SMEs. Other positive aspects with the SUP are the harmonization of rules and Member States right to choose way of implementation of the SUP into the national law.

However, the opinions on the online registration procedure were split. The EESC believes the online registration procedure is something negative that will lead to letterboxes in the long run, while the Swedish Companies Registration Office sees the online registration procedure as a positive action.

The negative opinions have differed between each and every opinion givers. The majority have, however, pointed out that the capital requirement is either too low or that it would lead to the circumvention of the capital requirement for the national company form. This would then lead to dishonesty and non-serious and criminal activities, but also high risk and debt burden. Some opinion givers have also discussed the choice of legal basis for the SUP-directive, which they do not agree to be the right one. Workers influence and weakened employees participation rights have also been a few of the negative opinions regarding the SUP.

Lastly, there were a few individual negative opinions. These were about the importance of personal responsibility and the protection of the creditors, and SUPs relation to national company forms which is considered uncertain in the SUP-proposal.

One opinion was that the SUP would not have the intended effect. Other opinions were e.g. the SUP would need too much resources on the legislative work and the marketing of the SUP, the rule regarding one shareholder and also the share register. The Swedish Companies Registration Office believes that seeing other European company forms did not have the effect intended, this might be the same for the SUP. The Registration Office also believes in case of litigation, it shall be held in Sweden if the company is registered here. Lastly there was an opinion that the abbreviation SUP was not appropriate to be used in Sweden.

Some recommendations have been given about identity check for online registration and SUP being restricted to SMEs. Questions have arose regarding when the national law should be used before the SUP-directive and how the SUP will affect the Swedish national law.

This shows that there are more negative opinions and uncertainties about the SUP compared to the positive opinions. However, it shall be noted that only the capital requirement, the legal basis and the employees participation rights were concerns that the majority of the opinion givers shared. My conclusion is that these are the core issues with the SUP-proposal.

5 Analysis

5.1 Regulation or directive?

A regulation needs unanimous approval and is binding in its entirety whereas for a directive, each Member State can choose their way to achieve the goal and is only binding as to the result to be achieved.

The difficulty with choosing a regulation as a legal form is to get all the Member States to agree on the same set of rules. Different Member States have different set of legislation, for example Sweden has a law system with statutory law whereas e.g. United Kingdom has a common law system with law deriving from customs and judicial precedence.

In the other hand, the problem with choosing a directive as a legal form is each Member States right to choose a method to achieve the goal intended with the directive. The result of this could be that some Member States put in more effort and resources to achieve the goal set for the directive while other Member States might not try hard enough.

A regulation must always have direct effect. This means individuals can directly refer to a European provision before a national or European court. A directive, however, can only have direct effect in certain cases, and that is when the provisions are unconditional and sufficiently clear and precise.¹⁰⁴

The purpose with explaining this is to understand which of these legal forms, if implemented, have better protection for individuals and to see which one is better for the affect that is intended to be achieved with the SUP. So basically, if the SUP-proposal would have the legal form regulation, this would mean that the proposal shall first get unanimous approval from all the Member States in order for it to go through. If this is achieved the regulation shall be directly applicable in all Member State. If it is not applicable in a Member State, individual can force their government, in their national court or in a European court, to invoke the provisions of the SUP-regulation. Thus, if the SUP-proposal would have the legal form of a directive, this would mean the Member States get to use what way to implement the SUP-directive into their national law in order to achieve the goal set in the directive. The problem with this, as mentioned above, can be the difference in effort each

¹⁰⁴ EUR-Lex, *The direct effect of European law*, <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1430905122200&uri=URISERV:l14547>, downloaded 2015-04-27.

Member State put to achieve the goal. If implemented, the SUP-directive is not directly applicable unless certain criteria are fulfilled. This means an individual cannot always force the government, with the courts help, to invoke the provisions of the SUP-directive.

With hindsight, we know the SUP-proposal has the legal form of a directive. This means if the SUP-proposal gets approval by all the Member States and gets implemented, but a Member State does not achieve the goals set in the directive in the given time frame; the individuals might not be able to force the Member State to invoke the provisions of the SUP-directive.

5.2 Comparison with SPE

When proposing the SPE, it was put forward as a regulation, whereupon some legal experts questioned whether a regulation was the right legal form. The opinion was to put forward the SPE as a directive instead. The discussion regarding this was that a directive would be more effective since the aim with SPE was to simplify for subsidiaries to be established in other Member States.¹⁰⁵

As mentioned above, the difference between a directive and a regulation is a regulation shall have general application, is binding in its entirety and directly applicable in all Member States, whereas a directive shall be binding to the goal to be achieved, only to the Member State to which the directive is addressed, but it is up to the national authorities to choose form and methods to how to achieve the goals.¹⁰⁶ Basically, by using a directive instead of a regulation, it will be easier to implement the legislation into the national law by simply set out a minimum requirement where each Member State choose their way to achieve the goal.¹⁰⁷ A regulation needs unanimous consent, which is difficult to obtain from 28 Member States¹⁰⁸, in opposite to the directive, which does not need unanimous consent and is therefore less complicated.¹⁰⁹

¹⁰⁵ D.F.M.M. Zaman, C.A. Schwarz, M.L. Lennarts, H.-J. de Kluiver and A.F.M. Dorresteijn (eds), *The European Private Company (SPE) – A Critical Analysis of the EU Draft Statute*, Intersentia, Antwerpen, 2009, p 25.

¹⁰⁶ Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C 326/47, TFEU, article 288.

¹⁰⁷ Zaman et al., *The European Private Company (SPE)*, p 25.

¹⁰⁸ European Union, *Countries – Member States of the EU*, http://europa.eu/about-eu/countries/index_en.htm, downloaded 2015-04-19.

¹⁰⁹ Zaman et al., *The European Private Company (SPE)*, p 26.

Apart from a directive, the legal form recommendation was considered for the SPE.¹¹⁰ A recommendation is not legally binding.¹¹¹ These instruments got rejected because they were considered not being able to introduce a new company form, even though these legal forms are theoretically more proportionate. The Commission did not believe these legal forms would provide for an application of a uniform set of rules nor maintaining a satisfactory level of legal certainty. Based on this, and the fact that regulations apply directly and provide a common set of rules across the Union, the Commission found that a regulation would be a proportionate measure as a legal form for the SPE.¹¹²

So what would have made SPE an attractive company form? The Commission's outgiving in this case was that it is not possible to determine the exact number of companies that would be interested in SPE, but the Commission estimates that at least companies with subsidiaries, joint ventures and companies that could convert to SPE, would have been most motivated companies. Basically, SPE would have been open to all company forms except those who publicly trade their shares.¹¹³

The motives to pick the SPE were also hard to predict at that point. It could have been anything between the low capital requirement to the possibility to establish a business cross-border.¹¹⁴ For example, the low capital requirement could have been attractive for e.g. German, Austrian and Dutch companies, who have a high capital requirement in their national legislation, whereas the capital requirement for SPEs was less attractive for Ireland, Cyprus, France and United Kingdom, who does not have any minimum capital requirements in their national laws. So, if the SPE did not have any other benefits that would suit these entrepreneurs, they would not have found the SPE attractive.¹¹⁵

Further, the SPE was first and foremost intended for larger businesses. Therefore it was not suitable for smaller businesses interested in collaborations in joint ventures, given the structure and employee participation rules of the SPE.¹¹⁶

The European Court of Justice, hereinafter referred as the ECJ, have given a wider meaning and acceptance to cross-border activity in the area of freedom of establishment by the

¹¹⁰ Zaman et al., *The European Private Company (SPE)*, p 26.

¹¹¹ TFEU, article 288.

¹¹² Zaman et al., *The European Private Company (SPE)*, p 26

¹¹³ Zaman et al., *The European Private Company (SPE)*, p 9.

¹¹⁴ Zaman et al., *The European Private Company (SPE)*, p 9.

¹¹⁵ Zaman et al., *The European Private Company (SPE)*, p 10.

¹¹⁶ Heribert Hirte, Christoph Teichmann (Eds.), *The European Private Company – Societas Privata Europaea (SPE), European Company and Financial Law Review, Special Volume 3*, De Gruyter, Berlin/Boston, 2013, p 38.

precedents in cases such as Centros¹¹⁷, Überseering¹¹⁸, Inspire Art¹¹⁹ and SEVIC Systems¹²⁰. In these cases the ECJ established e.g. that a company incorporated in one Member State may carry out business in another Member State without being regarded as abuse or fraudulent, it narrowed the national courts ability to take measures to impose national laws on foreign companies and also decided to prevent Member States from refusing cross-border mergers to register. Yet the case Cartesio¹²¹ proves there are still a few limitations persisting.¹²²

Given all these precedents and principles in the abovementioned cases, was SPE still needed? Not at the time of the proposal but it is believed to be a beginning of a development towards that direction.¹²³

5.3 The SUP-proposal

The minimum capital requirement is one of the main issues with this proposal. Seeing from Sweden's Governments point of view, I believe there could be an interest for the proposal. Sweden has a capital requirement of 50 000 SEK for private limited liability companies while the SUP is only 1 EUR. However, there is usually more than just a minimum capital requirement that matters when choosing a company form. If the creditors do not trust a SUP-company enough to provide with capital, the SUP-company will already there meet difficulties concerning establishing on the market.

Assume a Swedish entrepreneur chooses to set-up a company cross-border. The Entrepreneur will choose the SUP as legal form, because it is most beneficial for this entrepreneur. But where shall the SUP be set-up? If the entrepreneur chooses a country which has a high capital requirement for its national company legal form, for example Sweden with the requirement of 50 000 SEK, will the creditors give credit to this Swedish company, which will use the money for the capital requirement and for inventories, or will the creditors prefer to give credit to a SUP-company, which has a low capital requirement, but other costs? The other costs of the SUP-company might be lower than the 50 000 SEK, would this not

¹¹⁷ Case C-212/97 Centros Ltd mot Erhvervs- og Selskabsstyrelsen [1999] ECR I-1495.

¹¹⁸ Case C-208/00 Überseering BV and Nordic Construction Company Baumanagement GmbH (NCC) [2002] ECR I-9919.

¹¹⁹ Case C-167/01 Kamer van Koophandel en Fabrieken voor Amsterdam and Inspire Art Ltd [2003] ECR I-10155.

¹²⁰ Case C-411/03 SEVIC Systems AG [2005] ECR 10,805.

¹²¹ Case C-210/06 Cartesio Oktató és Szolgáltató bt [2008] ECR 1-10000.

¹²² Hirte, Teichmann, *The European Private Company – Societas Privata Europaea (SPE)*, p 40 f.

¹²³ Hirte, Teichmann, *The European Private Company – Societas Privata Europaea (SPE)*, p 46.

benefit the creditors? But how can the creditors be sure that either the company with high capital requirement alternatively the company with low capital requirement is not used for dishonest purposes?

The EESC's suggests a solution for the circumvention of the capital requirement. It is to oblige the SUP-companies that reach a certain size to convert to another company form. Other bigger enterprises might choose the SUP only for the reason to circumvent the minimum capital requirement. By eventually forcing the bigger SUP-companies to convert to another company form, the result will hinder already existing bigger companies to convert to a SUP, seeing they would have to convert to another company form as well.

One authority underlines the importance of personal responsibility and the protection of creditors. I am surprised this was not discussed by the majority of the opinion givers, seeing this matter is important in connection with the capital requirement.

The EESC's discussion regarding the employees' weakened participation rights have shown that moving a company's registered office could lead to weakening of these rights. The EESC's solution for this is to have one single registered office and administrative headquarter.

Regarding the resources put on the legislative work and marketing of the SUP, I believe this matter is not of importance to mention in this context. I think it is just a way to deprecate this proposal as a whole and to point out every dissident that is possible to find. Obviously there will be a need to put resources on the legislative work and the marketing of the SUP, and I believe it is a good thing to do so. Otherwise, the SUP, if implemented, will not have the effect as aimed for if it is not well thought out or if there is no knowledge of it.

The fact that the Commission will provide with templates for the registration of the SUP, I believe the Member States are uncertain of actually how much they will have a saying about the rules regarding the SUP. They might even not be willing to assign this much capacity to the EU to decide on. Even questions regarding when the SUP-directive will have precedence over the national law might discourage the Member States to implement the proposal.

6 Conclusions

The SUP is a new company form proposed by the Commission after the withdrawal of the SPE-proposal. The main purpose with the SUP-company is to ease for SMEs to set up businesses by lowering the costs and to ease the cross-border activity, and thereby abolish the restrictions on the freedom of establishment. To make this possible, the proposal suggests some rules that are intended to encourage companies to choose the SUP, one rule being the capital requirement of 1 EUR, or at least one unit of the national currency.

I have taken in consideration the opinions given regarding the SUP-proposal, by one European body and the rest from the Swedish government and various Swedish authorities. These opinions have shown that there is indeed an interest of a new European company form, especially one that would benefit SMEs. However, I would have wanted more European institutions or bodies to give their opinions regarding the SUP-proposal, to compare with.

The SPE-proposal has shown that at the time of its proposal, there was no need for a new European company form. There was indeed an interest for the proposed company but many Member States were not ready for this big change. That is probably also the case with the SUP; some Member States are not ready to give this amount of power to the Union, as the implementation would lead to. We can only wait and see if the SUP will have a better outcome than the SPE. Meanwhile, we can speculate. I believe there is a bigger interest in the SUP than the interest was for SPE. The work is going towards the right direction, which is the idea to implement such proposal in the future, but I do not believe it will be in a near future yet.

In my opinion, there is no urgent need for a new company form seeing there is no shortage of company forms; there are national company forms and there are European company forms. The existing company forms are obviously used and work well. What we might need is a company form with harmonized rules, as the SUP, if we want to develop and work towards a union with more uniform set of rules. The remaining question is whether the SUP is a better complement for some of the existing company forms.

As mentioned, the aim of SUP is to ease for SMEs to set up businesses on the Internal Market. This means the SUP is aimed to benefit SMEs, but will it? It is my opinion that it will. The SUP is intended for single-members who might not afford a high capital require-

ments or do not want to put in that amount of capital in a company. Therefore the SUP will benefit them with its 1 EUR requirement. It might also benefit bigger enterprises, also because of the capital requirement, seeing they could save money.

The EESC's solution for circumvention of the capital requirement is, according to me, a good solution. To force bigger SUP-companies to convert to another company form will ensure the SUP is only accessible for SMEs. This might also prevent a parent company to set-up a, probably but not necessarily, scam subsidiary as a SUP just to circumvent the capital requirement. Even the EESC's solution about the employees' participation rights is in accordance with my opinion. I agree that these rights shall be ensured in the Member State in which the SUP-company operates its primary business. By having uniform rules for these rights, the rights should not be weakened.

I doubt that the implementation of the SUP will lead to a drastic change on the market in a small amount of time that will lead to other company forms getting ruled out. I believe some entrepreneurs will realize that there is still a need of the other company forms even if the capital requirement is higher than the SUPs. The reason is entrepreneurs want to be seen as reliable to the creditors. By choosing a company form with the higher capital requirement the creditors might trust those companies more. It is unlikely that founders of a company would choose a company form, with high capital requirement, for scam companies.

The affect on the market can vary. The simplicity of setting up companies can be to ease for SMEs, as aimed for, and that will lead to more small and medium-sized companies on the market and also cross-border. But the simplicity of setting up companies can also lead to scam companies establishing themselves to a bigger extent. It could also lead to a lot of entrepreneurs dare to take a chance to start a business. The entrepreneurs might not go through their business idea one extra time, which might be a bad business idea, and that will lead to an increase of bankruptcy mostly represented by small businesses. It may also lead to an increase of companies in general resulting in an abundance of supply compared to the demand.

I share the opinion that the proposal is in need of deeper discussion and analysis in some aspects, such as the minimum capital requirement. If an entrepreneur cannot provide with capital for the planned business, how can one be sure that this will be a serious business? The creditors will certainly not support a company unless they can be sure, to an extent,

that this company will be able to repay its debt or otherwise fulfill its commitments. For this reason I believe further discussion regarding this proposal is needed for this proposal to get unanimous consent. The market can manage without a new company form on the market today, seeing there are numerous of options. However, in order to develop and extend the European Union, I believe this sort of company form is a good solution.

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Appendix I



Brussels, 9.4.2014
COM(2014) 212 final

ANNEX 1

ANNEX

to the Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on single-member private limited liability companies

{SWD(2014) 123 final}

{SWD(2014) 124 final}

{SWD(2014) 125 final}

ANNEX I

Types of companies referred to in Article 1(1)(a)

— *Belgium:*

‘société privée à responsabilité limitée/besloten vennootschap met beperkte aansprakelijkheid’,

— *Bulgaria:*

‘дружество с ограничена отговорност’,

— *Czech Republic:*

‘společnost s ručením omezeným’,

— *Denmark:*

‘anpartsselskab’,

— *Germany:*

‘Gesellschaft mit beschränkter Haftung’,

— *Estonia:*

‘osühing’,

— *Ireland:*

‘private company limited by shares or by guarantee/cuideachta phríobháideach faoi theorainn scaireanna nó ráthaíochta’,

— *Greece:*

‘εταιρεία περιορισμένης ευθύνης’,

— *Croatia:*

‘društvo s ograničenom odgovornošću’

— *Spain:*

‘sociedad de responsabilidad limitada’,

— *France:*

‘société à responsabilité limitée’,

— *Italy:*

‘società a responsabilità limitata’,

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— *Cyprus:*

‘ιδιωτική εταιρεία περιορισμένης ευθύνης με μετοχές ή με εγγύηση’,

— *Latvia:*

‘sabiedrība ar ierobežotu atbildību’,

— *Lithuania:*

‘uždaroji akcinė bendrovė’,

— *Luxembourg:*

‘société à responsabilité limitée’,

— *Hungary:*

‘korlátolt felelősségű társaság’,

— *Malta:*

‘kumpannija privata/private limited liability company’,

— *The Netherlands:*

‘besloten vennootschap met beperkte aansprakelijkheid’,

— *Austria:*

‘Gesellschaft mit beschränkter Haftung’,

— *Poland:*

‘spółka z ograniczoną odpowiedzialnością’,

— *Portugal:*

‘sociedade por quotas’,

— *Romania:*

‘societate cu răspundere limitată’,

— *Slovenia:*

‘družba z omejeno odgovornostjo’,

— *Slovakia:*

‘spoločnosť s ručením obmedzeným’,

— *Finland:*

Appendix

‘yksityinen osakeyhtiö/privat aktiebolag’,

— *Sweden:*

‘privat aktiebolag’,

— *United Kingdom:*

‘private company limited by shares or by guarantee’