

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

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The Council of Bars and Law Societies of Europe (CCBE) represents the bars and law societies of 32 member countries and 13 further associate and observer countries, and through them more than 1 million European lawyers. The CCBE responds regularly on behalf of its members on policy issues which affect European citizens and lawyers.

The CCBE, which has prepared this response, supports the Commission's desire to help European small and medium-sized enterprises and facilitate their cross-border activities. It notes that large enterprises would also benefit from the proposed Directive so that the SME label would not seem entirely appropriate.

The CCBE regrets that it was not possible to find a basis for unanimous agreement on the proposals for the SPE. It notes that the proposal on the SUP will not achieve the same for SMEs as the SPE proposal had been intended to achieve: for example, it will not be possible to use the SUP as a company for an SME with more than one shareholder or as a joint venture vehicle for SMEs.

The CCBE has various comments and suggestions on the draft directive as follows:

There are differences of opinion amongst the CCBE members as to whether or not the proposed Directive creates a new legal form and whether Article 50 TFEU is the correct basis for the proposal and whether the proposal is compatible with the principles of subsidiarity and proportionality. It is unclear to some members of the CCBE what legal nature the Commission believes the SUP would have under national company law. The proposed Directive in Article 1.1 and elsewhere in the proposed Directive creates the impression that the SUP is intended to be a separate company form under national company law which would exist in parallel with the types of companies listed in Annex I, i.e. "normal" private companies with limited liability. Recital (10) does not address this issue. It only deals with the interrelationship between an SUP, on the one hand, and a single-member private limited liability company under national on the other hand, by stating that Member States may decide to have all single-member private limited liability companies operate and be known as SUP, or alternatively to provide for the establishment of an SUP as a separate company law form which would exist in parallel with other national forms of single-member private limited liability companies. Recital (10) appears to be based on the assumption that a single-member private limited liability company is a separate form of company in national law. Some Member States, however, have the single-member private limited liability company not as a separate company law form but as a "normal" limited liability company, which is characterised by the specific fact that it only has one shareholder. In other words, it is - in terms of types of company form - a normal private company with limited liability which, at most, could be called a sub-category rather than a separate company law form. The proposed Directive's ambiguity about the legal nature of the proposed SUP has led some observers to be concerned that the Directive will introduce a new company law form by the back door, after the failure of the SPE Directive. For these reasons, the CCBE thinks it would be helpful to clarify the text of the Directive for a positive outcome of the legislative process.

Some members believe that a corporate entity should have a certain minimum share capital as a threshold of trustworthiness, in order to justify the privilege of limited liability and to prevent abuse of such a legal form. During the negotiations concerning the SPE, a minimum share capital of 8,000 euros was introduced in the compromise text. Article 16.1 and 16.4 permit the SUP to

have a share capital of 1 euro and prohibit a national law requirement to build up legal reserves. Articles 18.2 and 18.3 permit distributions other than from profits on the basis of an assets test and a solvency statement by the management body involving the exercise of judgement by the management. Under Article 19, distributions wrongly made must be refunded to the SUP provided it is established that the receiving shareholder knew or, in view of the circumstances, ought to have known, that the distribution was contrary to Articles 18.2 or 18.3. Some members are concerned that this will only be the case in exceptional circumstances because the receiving shareholder may have less information than the management body. Several members have serious concerns that this approach does not offer sufficient capital based protection to the SUP's creditors. They also believe there is a risk that the concept adopted by the Directive could invite people to establish an SUP just because of its greater flexibility as far as capital and assets are concerned. They also fear that the SUP may be a "Trojan horse" by introducing this concept of creditor protection into the national laws of private limited liability companies generally, because an existing limited liability company with a single shareholder could, by converting into a SUP, opt into the English law-influenced capital formation and protection system, and opt out of the continental law-influenced system which is less liberal as regards the rights of shareholders and, it is believed, benefits creditor protection.

Several members are convinced that a legality check is definitely indispensable before any company is formed as a new legal entity. Legality checks in general include establishing the identity of the founder (a top priority of the European Union is to prevent money laundering) and checking the legal permissibility of the company's statutes and name. Some members believe that lawyers should be involved in the process for forming a company. Consequently these members propose that formalities relating to registration (Art 13 of the proposal) should be left to the Member States. This corresponds to the most recent state of negotiations concerning the SPE even if the company is established through cross-border on-line registration and the requirement for legality checks to be maintained.

Several members are opposed to having different locations for the registered office and the central administration of an SUP because this could lead to circumvention of the provisions concerning co-determination of employees. These members wish to emphasise that the fact that the proposal covers both SMEs and corporate subsidiaries raises a significant difficulty because different regulation requirements exist in this respect, e.g. concerning co-determination of employees.

Several members argue that this proposal should, in accordance with its recitals, foster the facility of freedom of establishment and thereby strongly assist SMEs throughout the European Union. These members think that, in practice, the proposal would not assist SMEs but would however assist groups of multinational companies when structuring their affiliates throughout the European Union because it would allow them to have a single member structure (which for a typical group company would not be a problem), a very small share capital, direct discretionary power, different locations for the registered office and the central administration of the SUP (with the risk that this would allow circumvention of the provisions relating to co-determination) and a facilitated administration (so that all affiliates could have the same legal form). These members think it is evident that only large groups of companies active throughout the European Union would primarily benefit from the proposal.

Recital (9) This recital should make it clear that it only applies to single member companies formed as SUPs.

Commission wording	CCBE proposed wording
Single-member private limited liability companies formed and operating in compliance with this Directive should add to their names a common, easily identifiable abbreviation – SUP (<i>Societas Unius Personae</i>).	Single-member private limited liability companies formed and operating in compliance with Part 2 of this Directive should add to their names a common, easily identifiable abbreviation – SUP (<i>Societas Unius Personae</i>).
	Justification
	The name SUP should only be used for companies that comply with Part 2 of the Directive and not apply to all single-member

	companies.
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Recital (20), Article 13.1g and Article 15 Some members are not clear why SUPs should be required to have only one share and be prohibited from splitting that share. They are concerned that this will limit the attractiveness of the SUP – both for existing companies that want to convert to an SUP but have more than one share already and for SUPs formed with one share that wish to transform into a different type of company. These members think that the defining characteristic should be that there is a single shareholder, rather than the number of shares held. We note that Article 9.3 does not require an existing company that wishes to become an SUP to have only one share. In some Member States, such as Denmark, if there is only one share it would not be possible to increase the share capital by increasing the nominal value of the single share. We note that, if it were possible for an SUP to have more than one share, it would be necessary to prevent the transfer of a share taking effect whilst the company was still called an SUP.

Article 1.3 If a Member State allows companies other than those listed in Annex 1 to be single-member companies we suggest that it would be helpful for the Member State to inform the Commission of this and for the Commission to publish a list of such companies.

Article 6 Some members are unclear whether the Directive is intended to create a separate company law form or not (i.e., different from a company with limited liability under national law that only has one shareholder). As mentioned above, some members have concerns about the *vires* of the Directive to create a separate company law form. Other members believe the intention is for the SUP to coexist with other forms of single member companies and think it would be clearer if the wording set out expressly that the possibility of registering a private single member in accordance with Part 2 can be in addition to existing forms of single member companies. We have suggested some wording below to deal with this. It would also be helpful to clarify whether Directive 2009/101/EC is intended to apply to SUPs (we assume it is intended to apply).

Commission wording	CCBE proposed wording
Member States shall provide for the possibility of registering private single-member limited liability companies in accordance with the rules and procedures set out in this Part. Such companies shall be referred to as SUPs.	Member States shall provide for the possibility of registering private single-member limited liability companies in accordance with the rules and procedures set out in this Part. Such companies shall be referred to as SUPs. Member States shall determine whether all single-member private limited liability companies shall operate and be known as SUPs or whether an SUP may be established as a separate company law form which exists in parallel with other forms of single-member private limited liability company provided for in national law.
	Justification
	The additional wording reflects Recital (10) and makes the Directive clear that SUPs may exist in parallel with existing forms of single-member companies.

Article 7.2 We note that this states that Member States shall provide that the single-member shall not be liable for any amount exceeding the subscribed share capital. However, we also note that Article 18.5 makes the single shareholder liable for recommending or ordering a distribution if it knew or ought to have known that the distribution would be contrary to Article 18.2 or 18.3. There may also be other circumstances in which a single-member may be held liable for an amount exceeding the subscribed share capital, for example if the shareholder continues to

operate a business that generates losses or if there is an abuse of the corporate form. If the intention is to make it clear that a single-member is not liable to subscribe more than it has agreed to do by way of share capital, should the words instead say "Member States shall provide that the liability of the single-member to subscribe for share capital is limited to the amount, if any, unpaid on the share the single-member holds"?

Article 9 We are not clear on whether it will be possible for a company to convert directly from a public company to an SUP without first transforming to a form of private company. If it is not, this will increase expenses in such cases. In paragraph 3, there is no requirement for a company to have a single share and to have share capital of at least one euro before it converts to an SUP (assuming that these both remain requirements for the SUP). We think this should be included for clarity.

Commission wording	CCBE proposed wording
<p>Member States shall ensure that a company shall not become an SUP unless:</p> <p>(a) A resolution of its shareholders...</p>	<p>Member States shall ensure that a company shall not become an SUP unless:</p> <p>(a) it has a single share and a share capital of at least EUR1;</p> <p>(b) a resolution of its shareholders...</p>

Some members do not think it is necessary to require the company to have net assets at least equivalent to its subscribed share capital plus undistributable reserves – and so paragraph (c) should be deleted. Their argument is based on the fact that, if a company converts from an existing company to an SUP when this test is not satisfied, it remains the same legal entity and its creditors will not be worse off than before. There is no requirement for an SUP to meet this test at all times – so a company could be formed as an SUP and come to have net assets less than its subscribed share capital plus undistributable reserves. It therefore seems to put existing companies at a disadvantage to SUPs. Other members feel that the requirement protects creditors and employees and should be retained. One possible approach would be that, in countries where an existing company is required by national law to have net assets equivalent to its subscribed share capital plus undistributable reserves a company should not be allowed to convert into an SUP if it is in breach of this requirement. This would prevent existing companies from evading national law requirements by converting to an SUP.

Article 11 We think it is possible that Member States may have requirements as to the contents of articles of association and that these would apply unless something is included in the Directive to prevent this. If Member States are allowed to impose additional requirements, it would reduce the attractiveness of the SUP as being the same in each Member State. If the intention is to allow Member States to impose additional requirements, Member States should be required to notify the Commission of these additional requirements and the Directive should allow the uniform template to be amended to include such provisions. However, if the intention is that such national requirements should not apply, further wording should be included.

In the required contents for the articles of association we think the word "organisation" is rather vague. Also, as the SUP may only have one share (assuming no change is made on this) the reference to "shares" should be a reference to "share".

Commission wording	CCBE proposed wording
<p>The uniform template of articles of association shall cover the questions of formation, shares, share capital, organisation, accounts and the dissolution of an SUP.</p>	<p>The uniform template of articles of association shall cover the questions of formation, share, share capital, the matters dealt with under the heading organisation in Chapter 7, including who is entitled to represent the SUP if directors may not represent the SUP individually, accounts and the dissolution of an SUP.</p>
	<p>Justification</p>

	The word "share" rather than "shares" reflects the fact the company may only have one share. The word "organisation" is rather vague unless a cross reference to the matters dealt with in Chapter 7 is added.
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In paragraph 11.3 we think the reference to "the" uniform template should be a reference to "one" uniform template.

Commission wording	CCBE proposed wording
The Commission shall adopt the uniform template of articles...	The Commission shall adopt one uniform template of articles...
	Justification
	This makes it clear that there is only one uniform template.

Articles 12 and 14.4 We think it is slightly cumbersome and more expensive that a company being formed electronically as an SUP must use the uniform template of articles, although it may immediately change its articles to a different form.

Commission wording	CCBE proposed wording
Member States shall require that the articles of association of the SUP shall cover at least the subject matter provided in paragraph 2.	Member States shall require that the articles of association of the SUP shall cover [deletion of at least] the subject matter provided in paragraph 2. An SUP may include more information in its articles of association in accordance with applicable law.
	Justification
	This wording gives the SUP an express right to include more information in its articles of association if allowed by the applicable national law.

Article 13.1(c) Some Member States, including the UK, do not require a company to state its business object on formation although other Member States do. It is not clear from the Directive what the effect of having a business object is or what the effect of doing something outside the stated business object would be and whether this would be a matter for national law. If the intention is to state the main business activity for information reasons, this should be made clearer. If it is intended that all Member States should require the company to have a business object, with consequences for not following that business object, that should be made clearer.

Article 13.1(d) There is no definition of "beneficial owner" and we are not sure who would be treated as a beneficial owner for this purpose. We suggest that another definition is used, for example to fit with the anti-money laundering requirements. As these may differ from Member State to Member State, we suggest that Member States should be required to set out in detail what information is required. Some members are concerned that the Directive is not sufficiently detailed as to what may be required to verify the identity of the founding shareholder and the beneficial owner of the single share and that this should be clearer.

Article 13.1(e) We think the word "not" in line three is incorrect and should be deleted, as we assume information should be provided if a person has been disqualified.

Article 14.1 Some members are concerned that the proposed Directive uses the incorporation theory, rather than the real seat theory. Some members have suggested adopting the approach used for the Societas Europaea.

Article 14.5 As Member State rules will differ, Member States should be required either to notify the Commission of the rules they have made or to put them on the website of their companies registry. The rules should be proportionate and not more onerous than is reasonably needed to verify the identity of the founding member, etc. We wonder whether this is an area where the Commission might adopt implementing measures for what is proportionate.

Some members are concerned that the registration procedure, which is entirely electronic and which must be completed within three working days (Articles 14.3 and 14.4), will not offer sufficient opportunity to carry out the checks normally required for money laundering and organised crime purposes or to determine whether the proposed management has been disqualified from acting as managers (cf. Article 13.1(e) and Article 14.5). These members fear that this will lead to an abuse of the SUP form. The Commission has said that some Member States do not have the required rule of law level in particular so far as the fight against money laundering and organised crime is concerned.

Article 14.6 Our understanding of the wording proposed in Article 14.6 is that the intention is that the registration of an SUP should not be delayed pending obtaining a required licence or authorisation – but the draft wording might be read as overriding any licence or authorisation requirement that would otherwise apply. We would not expect Member States to be willing to accept that a company is not required to obtain a licence or authorisation that would otherwise be required (e.g., for banking or insurance) just because it has been formed as an SUP. In some Member States, such as Germany, companies are required to apply for, and obtain, a licence for certain activities (such as banking and insurance) before the company is registered. Some members are therefore concerned that allowing a registration of an SUP without first meeting any national requirement to obtain any necessary licence or authorisation will lead to a loss of protection for consumers and others who are protected by the existence of the licensing requirement. In other Member States, it is possible to form a company first and apply for a licence after the company is registered but before the company carries on the regulated activities. We wonder whether Article 14.6 could leave the matter to national law. If the concern is that an SUP should not be made subject to any licencing or other regulatory requirement that would not apply if another type of single member company were formed instead, the wording of Article 14.6 could make this clearer.

Article 15 As explained above, some members do not see why an SUP should be limited to one share or why there should be a requirement that the single share should not be split. If more than one share is allowed Article 15.2 would need to be changed so an SUP could acquire its own shares, provided it had at least one share left. Provisions dealing with acquisition of own shares would then need to be included.

Some members are concerned that limiting the SUP to cases where there is a single shareholder with a single share will limit its attractiveness to SMEs, particularly in cases where a single person may want to bring in new shareholders because the business is expanding or where a single shareholder dies and leaves the share to more than one person or wishes to retire and gift the share to more than one person. We hope that, if the SUP is successful the Commission will consider amending the requirements so that the same approach can be adopted in cases where there is more than one share. We recognise that, in such cases, the Directive will need to include more requirements to regulate the dealings between shareholders.

Article 16 Some members are concerned that the proposal to allow the SUP to be created with one share of 1 euro, coupled with the proposed provisions on creditor protection, does not provide sufficient protection for creditors. Other members believe that if the Commission has accepted that protection for creditors is to be provided by the provisions of Articles 18 and 19 the notion of a minimum share capital could be dispensed with entirely. There is also a concern that it is not clear whether it is for Member States or for the founding shareholder to decide what the minimum share capital should be, and the drafting should make this clearer. We assume the intention is that the founding shareholder can decide on the minimum share capital provided it is at least 1 euro.

Article 17.2 It seems that the share capital can only be paid up in cash in the case of an online registration, whilst in the case of other registrations relevant national law will apply as the Directive does not specify otherwise but it would be helpful for this to be clarified. Subsequent increases or decreases of share capital can be made in cash or in kind. As the rules of Member States on contributions in kind vary, and as SMEs may want to contribute a business or a

workforce or services as consideration for the share, it would be helpful to include provisions on the requirements for contributions in kind (for example what is allowed and whether valuations are needed). We also suggest that the Directive should require Member States to publish information about their national rules either on the website of their company registry or to provide information to the Commission for publication.

Article 17.2 If the minimum requirement of share capital of 1 euro is kept, we think it should be made clear that the share capital cannot be reduced below this minimum.

Commission wording	CCBE proposed wording
The subsequent increase or decrease of share capital shall be allowed at least in cash and in kind.	The subsequent increase or decrease of share capital shall be allowed at least in cash and in kind. The share capital shall not be decreased below EUR 1.
	Justification
	This makes it clear that the SUP must have at least EUR 1 of share capital.

Article 17.3 In some Member States it will not be possible to open a bank account in the name of the SUP before the SUP is registered. We think it should be clearer that payment into a bank account not in the name of the SUP but intended to be used for the share capital of the SUP is sufficient.

Commission wording	CCBE proposed wording
In case of cash payment the Member State of registration of an SUP shall accept payment into a bank account of a bank operating in the Union as evidence of payment or increase in the share capital.	In case of cash payment the Member State of registration of an SUP shall accept payment into a bank account of a bank operating in the Union as evidence of payment or increase in the share capital. Where a cash payment is made before registration of the SUP, the bank account need not be in the name of the SUP provided it is clearly designated as to be used to pay up the share capital once registration has taken place.
	Justification
	The additional wording recognises that it may not be possible to pay cash into a bank account in the name of the SUP before the SUP is registered.

Article 21.2 We suggest that the single member should also have to decide on mergers or divisions by the SUP. Article 21.2(c) requires the single member to decide on an increase in the share capital. We suggest that the Commission should include an article to set out the procedure to be followed to give effect to such an increase.

Article 23 This Article allows the single member to give instructions but says instructions are not binding if they violate the articles of association or the applicable national law. The SUP may operate in jurisdictions outside the Member State where it is incorporated and we do not think an instruction that would violate any applicable law should be binding. We suggest that express wording should be included to make it clear that a director does not incur personal liability if they follow a binding instruction given by the single member.

Commission wording	CCBE proposed wording
<ol style="list-style-type: none"> 1. The single-member shall have the right to give instructions to the management body. 2. Instructions given by the single-member shall not be binding for any director insofar as they violate the articles of association or the applicable national law. 	<ol style="list-style-type: none"> 1. The single-member shall have the right to give instructions to the management body. 2. Instructions given by the single-member shall not be binding on any director insofar as they violate the articles of association or any applicable [deletion] law. 3. A director shall not be personally liable for any liability that results from executing a binding instruction given by the single-member.
	Justification
	This makes it clear that instructions that involve violation of any applicable law are not binding.

Article 25

Commission wording	CCBE proposed wording
Member States shall ensure that their national law requires SUPs to be dissolved or transformed into another form of company if SUPs cease to comply...	Member States shall ensure that their national law requires an SUP to be dissolved or transformed into another form of company if it ceases to comply...
	Justification
	The wording makes it clear that the obligation applies on an individual basis.