
The EU, Close Corporations and Member State Sovereignty: Too Close for Comfort? Critical Reflections on the Evolving *Societas Unius Personae* (SUP) Proposal

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I. Introduction

The history of European corporate law is littered with examples of grand plans unrealised; it is not surprising that EU legislative intervention in the arena of company law has been characterised as “fragmentary”¹ in nature. Whatever about EU regulatory action concerning publicly traded entities where EU harmonisation efforts have been concentrated, whether harmonisation for close corporations is either desirable or realistically achievable is a matter which divides both company law commentators² and the wider public. What can be said with certainty is that it is a subject worthy of study given the potential regulatory impact.³ This article is concerned with the policy aftermath of the unsuccessful European attempt to develop a supranational private company in the form of the *Societas Privata Europea* (‘SPE’).⁴ Debate on the SPE proposal⁵ during successive Council presidencies led to a clash between the values and ideals of a harmonised regime and those of Member State sovereignty which ultimately were its undoing. Following the abandonment of the SPE in 2013, the Commission developed a proposal in 2014 for the *Societas Unius Personae*

¹ W Schon, ‘The Concept of the Shareholder in European Company Law’ (2001) 1 EBOR 3, 8.

² See BR Cheffins, *Company Law: Theory Structure and Evolution* (Clarendon Press, 1997) Chapter 9. GH Roth and P Kindler, *The Spirit of Corporate Law: Core Principles of Corporate Law in Continental Europe* (CH Beck/Hart/Nomos, 2013) Chapter 6; M Neville, KE Sorensen, ‘Promoting Entrepreneurship: The New Company Law Agenda’ (2013) 15 EBOR 545; KJ Hopt, ‘Corporate Governance in Europe: A Critical Review of the European Commission’s Initiatives on Corporate Law and Corporate Governance’ (2015) 12 New York Journal of Law and Business 139.

³ For an excellent study of regulation of SMEs in continental Europe see Roth and Kindler (fn 2).

⁴ See generally, J Viera González, C Teichmann (eds), *Private Company Law Reform: The Race of Flexibility*, (Thomson Reuters Aranzadi, 2015). See also DFMM Zaman et al (eds), *The European Private Company (SPE): A Critical Analysis of the EU Draft Statute*, Intersentia, 2009; P Davies, ‘The European Private Company (SPE): Uniformity, Flexibility, Competition and the Persistence of National Laws’, European Corporate Governance Institute Law Working Paper No. 154/2010.

⁵ *Commission Proposal for a Council Regulation on the European Private Company Statute* 2006/2013(INI) of 1 February 2007 (‘the SPE Proposal’) <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV%3Aami0007>.

(“SUP”),⁶ conceived as a revamped single member company designed to provide for ease of cross-border trade.⁷ The failure of the SPE proposal to live up to the hype which surrounded it prompted policy-makers to consider a more modest reform possibility: whether the single-member company could be reformed to provide a convenient means of enabling expansion into other Member States. In doing so the Commission focused attention anew on the single-member company some 25 years after the adoption of the Single Member Directive in 1989.⁸ The SUP project involves a plan to revisit and replace the 2009 Directive on Single-Member Companies with a new Directive for single-member companies under the SUP banner.

This article critically engages with the proposed SUP Directive as designed to facilitate the cross-border establishment of SME companies within the EU. Part II provides an assessment of the underlying policy objectives of the SUP. Part III then examines the likely impact of the SUP including consideration of matters of company formation, the use of national template constitutions, management of the SUP, and creditor protection. It concludes with an assessment of the future prospects of the SUP in light of the controversy it has attracted. In the Conclusion it is suggested that even with the more modest goals of the SUP Proposal as compared with the SPE, and the attempts to assuage Member States concerns through resort to subsidiarity, the likelihood of adoption of the SUP as a Directive remains uncertain. Furthermore, the case for the commercial need for this corporate vehicle remains unproven.

II. Assessment of the Underlying Policy Objectives of the SUP

The *Societas Privata Europea* Proposal for a Supranational Harmonised Close Corporation

Before looking at the SUP, it is worth providing some brief contextual policy background in relation to the failed policy initiative in the field of close corporations which went immediately before it in order to highlight the pressure points at work. The European Commission’s Proposal for a Statute on a European Private Company (the ‘*Societas Privata Europea*’ or ‘SPE’) published in June 2008⁹ was designed to facilitate SMEs to carry on business across borders in the EU by

⁶ European Commission, *Proposal for a Directive of the European Parliament and of the Council on Single-Member Private Limited Liability Companies* Brussels, 9.4.2014 COM(2014) 212 final (“the SUP Proposal”) <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2014:212:FIN>. All subsequent references in the text of this article to the “SUP Proposal” are references to this document.

⁷ The genesis of the SUP Proposal can be traced to the Reflection Group’s Report in 2011: *Report of the Reflection Group on the Future of EU Company Law*, European Commission, 2011 http://ec.europa.eu/internal_market/company/docs/modern/reflectiongroup_report_en.pdf.

⁸ Twelfth Council Company Law Directive 89/667/EEC of 21 December 1989 on single-member private limited liability companies [1989] OJ L395/40.

⁹ European Commission, (fn. 5). The European Parliament approved the proposal but suggested amendments which were adopted by the Parliament in March 2009: *European Parliament Legislative Resolution of 10 March 2009 on the Proposal for a Council Regulation on the Statute for a European Private Company* http://www.europeanprivatecompany.eu/legal_texts/download/EP_2009_en.pdf.

providing a vehicle that would allow cost-savings in relation to company formation, legal advice, administration and management and would promote growth. It was envisaged that the SPE would obviate the need to establish subsidiary companies in each Member State in which business would be carried on. The SPE proposal formed part of a suite of measures designed to assist SMEs in carrying on business in the single market collectively referred to as the “Small Business Act” or “SBA”. However, at the same time the SPE also had the potential to offer similar benefits to larger companies and groups.

Fundamental to any corporate law system is devising an appropriate balance between mandatory and enabling rules. This balance was especially difficult to strike for the proposed SPE given the continuum of national policy perspectives on a wide range of governance issues. There are fundamental differences in relation to how company law systems in different Member States seek to achieve creditor protection¹⁰ and Member States were at odds over issues such as capitalisation, moving from a real seat doctrine and the issue of employee participation. Ultimately these differences were not capable of resolution. Under the remit of REFIT,¹¹ whereby the Commission withdraws legislative proposals that are viewed as outdated or as not having achieved the requisite degree of legislative support, the SPE was withdrawn without fanfare by the Commission.¹² The much-vaunted SPE project on a European Private Company Statute was archived in 2013 as an unrealised ambition. However, there was still strong support within the Commission for the ideals which underlay the SPE and a desire to find a way to address the shortcomings which led to its downfall. It was against this political background that in 2013 the Commission unveiled the *Societas Unius Personae* (“SUP”).¹³

The Societas Unius Personae as the New Single-Member Company

The SUP was a less ambitious proposal than the SPE and one that was more confined in scope being limited to the single-member company. The Commission’s policy decision to focus on reworking the single member company through minimum harmonisation following on the failure to create a maximalist supranational close corporation was a case of avoiding going completely back to the drawing board by opting instead to pick lower hanging fruit which would still yield some of the some objectives for cross-border trade originally marked out for the SPE. The SUP Proposal which the Commission published in 2014 was a sparsely sketched document which in many respects raised more questions than it answered. It has the feel of a document seeking to herald a reform which is far less contentious

¹⁰See generally L Enriques and M Gelter, ‘Regulatory Competition in European Company Law and Creditor Protection’ (2006) 1 EBOLR 417.

¹¹REFIT is the European Commission’s Regulatory Fitness and Performance programme which is designed to achieve an effective regulatory framework and to reduce regulatory costs.

¹²It was nonetheless reported that the SPE received a strong level of support within the business community: European Commission, “Proposal for a Directive on Single-Member Private Limited Companies – Frequently Asked Questions” Memo/14/247, Brussels, 9 April 2014 http://europa.eu/rapid/press-release_MEMO-14-274_en.htm.

¹³SUP Proposal (fn 6).

than the SPE; the scope of the SUP is undoubtedly far less ambitious than the SPE. In May 2015, the Council agreed a revised SUP Proposal¹⁴ (the 'Revised SUP Proposal') which sought to allay national fears by fleshing out the text considerably and granting a great deal more autonomy to Member States. With that compromise comes a much reduced potential level of harmonisation across Member States in relation to the operation of the SUP in practice.

The focus on SMEs and, in particular, single-member companies in relation to the SUP was consistent with the underlying objectives evident in the review of the Small Business Act¹⁵ and the estimate that single-member companies comprised 40 per cent of limited liability companies within the EU.¹⁶ The introduction of the single-member company through the medium of the 12th Company Law Directive¹⁷ had helped to dispose of the fiction of involving token shareholders to meet minimum shareholder requirements set above one member. It was designed to provide an agile, streamlined company form for entrepreneurs that would cut through layers of unnecessary procedures and paperwork and allow efficient decision-making by a single entrepreneur incorporating a limited liability company to avail of the advantages of limited liability. The 12th Company Directive had been subject to a series of amendments before its codification in 2009.¹⁸

The practical effect of the adoption of a Directive on the SUP would be to replace the existing 2009 Single-Member Company Directive. One of the downsides of the minimum harmonisation approach of the Single-Member Company Directive was that many national variations arose in relation to the rules governing such entities. To date what has been achieved in relation to single-member companies is a limited harmonisation that leaves a good deal of discretion to Member States in relation to the finer details concerning the corporate law rule-book.¹⁹ Reforms to the single-member company would be welcome seen purely from a single market perspective. Many important practical issues which impact on ease of incorporation and post-incorporation functioning of single-member companies were not directly addressed. Among these omissions were the procedural requirements to be followed to form a single-member company, prescription of capitalisation requirements and creditor protection provisions. As a consequence, the legal regime surrounding the single-member company differs materially from one Member State to another based on the nuances of national policy choices. This can be seen to operate as a barrier to trade between Member States which to some minds jars in the context of the business right of free establishment under Article 49 TFEU.²⁰

¹⁴ European Council, *Proposal for a Directive of the European Parliament and of the Council on single-member private limited liability companies* 2014/0120 (COD), 29 May 2015 <http://data.consilium.europa.eu/doc/document/ST-9050-2015-INIT/en/pdf>.

¹⁵ European Commission, *Review of the 'Small Business Act' for Europe* COM(2011) 78, 23.2.2011 <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0078:FIN:en:PDF>.

¹⁶ SUP Proposal (fn 6), p 2.

¹⁷ Fn 8.

¹⁸ Directive 2009/102/EC.

¹⁹ F Wooldridge, 'The draft Twelfth Directive on Single-Member Companies' [1989] JBL 86, 89.

²⁰ See further WG Ringe, 'The European Company Statute in the Context of Freedom of Establishment' (2007) 7 JCLS 185.

However, as will be seen below, the evolving drafting of the SUP Proposal has witnessed the gradual erosion of the prospect of harmonisation on many such matters as Member State autonomy held sway.

The Commission's policy focus in relation to the SUP development was trained on the single-member company as providing a simple parent-subsidary company mechanism for cross-border corporate groups in the EU, in recognition of the fact that corporate group usage of the single-member company provides potentially a greater rationale for reform than usage by the small entrepreneur. More broadly, freedom of establishment is at its heart.²¹ Nonetheless, it is legitimate to question whether there is in fact a real commercial need for this revamped single-member company. The Commission believed so based on consultation responses received during the 2012 consultation on the future of European company law and the 2013 online consultation on single-member companies.²² Having engaged in a stakeholder consultation exercise,²³ the Commission relied on a mandate provided by the business community's support for the SUP measure. It should nevertheless be evident that it is often feasible to simply establish a branch in another Member State rather than establishing a subsidiary and, moreover, the mere fact that it is possible to establish a company in another Member State does not mean that it will be availed of in practice given other barriers to entry.²⁴

It is legitimate to question whom the SUP is designed to serve. In theory, the potential beneficiaries include the protagonists of start-up ventures to whom a 'one man company' structure is appealing from a management perspective. The EU noted that SMEs form "the backbone of the EU economy"²⁵ with particular potential to drive economic growth and employment. However, a major policy driver appears to be the potential appeal of the SUP to both national and international groups. The Reflection Group spoke of a Directive "requiring all Member States to make available a private company template for a single parent shareholder company with a simple structure basically limited to harmonised rules on key issues which would be possible because this company would only have one shareholder."²⁶ The *volte face* from an earlier primary focus on the sole trader to focus on cross-border groups has attracted some negative feedback. The European Economic and Social Committee of the European Parliament indicated

²¹ On freedom of establishment in a corporate context see M Gelter, "Centros, Freedom of Establishment for Companies, and the Court's Accidental Vision for Corporate Law" in F Nicola and B Davies (eds), *EU Law Stories* (Cambridge University Press, 2015).

²² SUP Proposal (fn 6), p 4.

²³ 62 percent of respondents were in favour of the introduction of a legislative measure concerning single-member companies to facilitate SME cross-border activity: SUP Proposal (fn 6), p 4.

²⁴ On the relevance of path dependence see K Heine and W Kerber, 'European Corporate Law, Regulatory Competition and Path Dependence' (2002) 13 *European Journal of Law and Economics* 47.

²⁵ European Commission (fn 12), p 1.

²⁶ Reflection Group, (fn 7), p 58.

that it would prefer if the SUP were expressly limited to the SME sector in the single market, stating:

“To ensure the proposed directive is favourable for SMEs, its scope should be restricted to such companies. This instrument is not intended to give internationally operating groups of companies the option of running subsidiaries that may have hundreds or thousands of employees as SUPs.”²⁷

The EESC also called for the introduction of a cross-border trading requirement.²⁸ As pointed out earlier, whether there is a need for these partial reforms of a non-fully harmonised corporate vehicle is debatable. Publicity surrounding the release of the SUP Proposal focused on the potential for SMEs and individual entrepreneurs to expand their activities to other Member States as well as the potential for foreign direct investment through using the SUP as the linchpin of a group structure.²⁹ Although much was made about facilitating cross-border groups, the 2014 Proposal drafted by the Commission did not contain a requirement of a cross-border element to avail of the SUP. Nor did it appear in the Council’s Revised SUP Proposal despite the continuing rhetoric of encouraging cross-border trade by SMEs which remains peppered though the Recitals. This development mirrors the gradual falling away of a strict cross-border trading requirement which occurred in relation to the SPE proposal as it evolved.³⁰

An important question to ask is whether the SUP would provide an attractive mechanism for cross-border expansion in practice by allowing ease of establishment of cross-border groups? The answer depends in part on understanding the national frameworks within which close corporations (including single-member companies) operate in practice. Multinational parent companies will often choose to incorporate a subsidiary company in jurisdictions in which they trade and this creates an impetus towards agreeing on a common legal framework to enable ease of incorporation of the single-member company within the single market without undue regulatory burden and cost. It is true that Article 50 TFEU speaks of “the progressive abolition of restrictions on freedom of establishment” rather than the complete abolition. Nonetheless, ease of incorporation is only part of the jigsaw and parent companies behind financially larger trading groups will be likely to be acutely aware of the pre-incorporation/post-incorporation dichotomy of legal consequences when weighing up structural and jurisdictional choices. Indeed the European Parliament’s Committee of Legal Affairs Rapporteur regarded the notion of a vehicle which would facilitate cross-border companies as a good one but considered the means of execution poor, particularly

²⁷ *Opinion of the European Economic and Social Committee on the ‘Proposal for a Directive of the European Parliament and of the Council on single-member private limited liability companies’* COM(2014) 212, http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AAOJ.C_.2014.458.01.0019.01.ENG, para. 1.8.

²⁸ European Economic and Social Committee, (fn 27), para 1.9.

²⁹ European Commission (fn 12).

³⁰ See further D Ahern, ‘Close Corporations: A Common Law World Perspective – The Case of Ireland’ in Viera González and Teichmann (eds) (fn 4).

in view of the fact that so many aspects were deferred to Member States under the subsidiarity principle.³¹

In considering whether the introduction of the SUP is justified, there is some concern relating to the possibility of single-member companies and group structures being used to facilitate fraud.³² Misuse of the corporate form is as old as the corporate form itself. This does not make the corporate form a problem, rather the law needs to work to make misuse of the corporate form unattractive. Indeed, a number of high profile cases have arisen in the English courts concerning the implications of the use of single-member companies where wrongdoing is found.³³ The Council's Revised SUP Proposal notes that Member States would remain free to prevent single-member companies from being the sole member of other single-member companies.³⁴ That is of some assistance but is enabling rather than directive so avoids a common position being reached across Member States. One senses in this instance and many others in the SUP Proposal's history that during policy formation there is a much higher regard for national sensitivities this time round than prevailed during the heyday of the SPE. Lessons concerning respect for the differing choices of Member States concerning the principles underlying their corporate law system have been learned. That may unfortunately mean that in devising EU corporate law policy principle is being increasingly sacrificed for pragmatism in order to increase the likelihood of getting a proposed instrument over the line.

III. The Likely Impact of the SUP

This section considers how the SUP Proposal would be likely to function in practice and its regulatory footprint. While the SPE could be classed as highly enterprising in scope, by contrast the SUP Proposal is soberly in line with the principle of proportionality being plainly limited in scope to the achievement of certain rudimentary objectives rather than seeking to provide an all-encompassing solution to the problems of SMEs trading using the private limited company form. The main contribution or impact of the realisation of the SUP is likely to be a reduction in formation costs and a lessening of regulatory burden in connection with company formation. This has provided the primary motivation for the decision that the requirements of subsidiarity do not indicate that it would be more beneficial to leave these matters to the national law of Member States as to do so would be unlikely to achieve a harmonised result.³⁵

³¹ L de Grandes Pascual, *On the Proposal for a Directive of the European Parliament and of the Council on Single-Member Private Limited Liability Companies* 26.1.2016 <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fNONSGML%2bCOMPARL%2bPE-575.031%2b02%2bDOC%2bPDF%2bV0%2f%2fEN>.

³² de Grandes Pascual, (fn 31).

³³ *Stone & Rolls Ltd v Moore Stephens* [2009] UKHL 39; [2009] 1 AC 1391; *Jetivia SA v Bilta (UK) Ltd (in liquidation)* [2015] UKSC 23.

³⁴ SUP Revised Proposal, (fn 14), Art 6(2).

³⁵ SUP Proposal (fn 6), pp 5–6.

General Regulatory Approach

The decision to avoid the creation of a discrete supranational corporate form in the manner of the ill-fated SPE would appear to have been influenced by the desire to achieve a workable result that would not fall foul of the complexities and political sensitivities that the direct imposition of a new European legal form would entail. Much of the contentious subject matter of the delicate negotiations on SPE has been allocated to Member States. Thus, for example, detailed provisions concerning employee participation are not provided for.

Given that the SUP does not involve a supra-national company form, there is discretion given to Member States in relation to the extent which they opt to overhaul national corporate forms.³⁶ For example, if the SUP Proposal does manage to negotiate the hurdles required in order to be adopted, a Member State may choose to opt for the tripartite option of providing separately for the SUP, the single member company and the private company/close corporation. Alternatively, the SUP may supersede the single-member company leaving it and the close corporation in a bifurcated structural option.³⁷ In other words, the SUP Proposal is broadly enough worded as to allow Member States to choose to either introduce the SUP as an additional company form which would exist in parallel with the existing single-member company at national level, or to choose to replace the current single-member company with the new form SUP. When considering this option, Member States would need to bear in mind that the SUP vehicle is limited in scope to the single shareholder model. Under Article 9 of the SUP Proposal, Member States would also need to provide procedures for conversion to other multi-member forms as listed in Annex I.³⁸

Using a Directive by definition provides Member States with flexibility in relation to manner of implementation into national law. Minimum harmonisation is a far cry in legal terms from maximum harmonisation.³⁹ Matters which are not directly covered by the Directive will be subject to national law. More specifically, the SUP Proposal is prescriptive in relation to some aspects of procedures for incorporation and leaves other relevant matters to Member State law. Despite the focus on reduction in legal and administrative costs,⁴⁰ a minimum harmonisation approach necessarily gives rise to the potential for increased legal costs for cross-border expansion within the single market. The Commission's thinking is evident in Recital 10 of the SUP Proposal which states that in order to respect "Member States' existing traditions of company law, flexibility should be afforded to them as regards the manner and extent to which they wish to apply harmonised rules governing the formation and operation of SUPs." The proposed minimum harmonisation approach using a Directive as the appropriate regulatory instrument contrasts with the challenging

³⁶ This choice is set out in Recital 10 of the SUP Proposal (fn 6).

³⁷ Ireland would be likely to favour the first option given the Companies Act 2014 does not provide publicly available model articles of association.

³⁸ Conversion is founded on a shareholder consent model.

³⁹ JC Dammann, 'Freedom of Choice in European Corporate Law' (2004) 29 *Yale J Intl Law* 477.

⁴⁰ Recital 3 of the SUP Proposal (fn 6).

maximum harmonisation approach⁴¹ pursued under the SPE agenda through use of an ‘all or nothing’ regulation. This perhaps reflects important lessons learned in relation to the strong expressions of national sovereignty which emerged during debate on the SPE during successive Presidencies of the Council of the European Union which sought to shepherd the SPE towards adoption. The SUP text comes across as a ‘softly, softly’ approach which is far less politically contentious in both form and substance but not entirely without controversy either. There is discretion given to Member States as to its application and notably the SUP Directive’s provisions would be subject to an overlay of mandatory rules at national level given that what is contemplated is a national rather than a supranational company form. Thus issues such as employee participation and transfer of seat would remain matters to be resolved by reference to relevant national law.⁴²

Company Formation

The simplification of formation requirements associated with the SUP is traceable to the EU Reflection Group’s Report⁴³ and in terms of regulatory impact assessment is predicated on considerable cost savings accruing.⁴⁴ What is envisaged is a very streamlined and user-friendly online registration process while off-line company formation is also facilitated. In relation to registration formalities, a prescriptive approach is evident in setting out the only information that Member States are entitled to require in order to register an SUP. This would help to create a level playing field at least at the level of formation. The contemplated provision of a template by Member States for use by company registrars in collecting this information is a step would help to cut down on red tape. Companies availing of the SUP Directive would be required to add the SUP abbreviation as a signifier to their name.⁴⁵ The electronic filing option for forming SUPs means that the founder would not have to physically set foot in the Member State in which it is desired to establish a single-member company.⁴⁶ It is contemplated that the entire registration process for an SUP could be completed electronically. The EESC has emphasised the need to ensure that rigorous identity checks are conducted prior to allowing incorporation.⁴⁷

Article 14(1) of the Revised SUP Proposal states that “[a]n SUP shall be registered in a Member State in which it is to have its registered office and complies with the rules of that Member States.” For civil law jurisdictions within the EU, it is of great significance that the SUP Proposal does not embrace the real seat doctrine.

⁴¹ On maximum harmonisation as a regulatory choice see A De Vries, ‘The Aim for Complete Uniformity in EU Private Law’ (2012) 20 *ERPL* 913; C Gerner-Beuerle, ‘United in Diversity: Maximum versus Minimum Harmonisation in EU Securities Regulation’ (2012) 7 *CMLJ* 317.

⁴² On the relevance of employment law to the market for company incorporations see M Gelter, ‘Tilting the Balance between Capital and Labor? The Effects of Regulatory Arbitrage in European Corporate Law on Employees’ (2010) 33 *Fordham Intl L J* 792.

⁴³ Reflection Group, (fn 7), section 4.3.

⁴⁴ European Commission, (fn. 12), p. 4.

⁴⁵ Revised SUP Proposal, (fn. 12), Article 7(3).

⁴⁶ SUP Proposal (fn. 6), Article 14(3).

⁴⁷ European Economic and Social Committee, (fn 27), paras 4.2.1 – 4.2.2.

As a consequence, Member States would not be able to mandate the co-location of an SUP's registered office and its central administration within the one Member State.⁴⁸ This has given rise to concerns about cynical regulatory arbitrage. The EESC expressed its concern about this element of the SUP Proposal in the following terms:

"The EESC believes that a SUP should not be registered in a place where it carries out no business activities whatsoever (letter boxes). The proposed distinction between a company's registered office and its administrative headquarters, which is a first for a European company form, therefore sets a precedent, which has raised concerns at the EESC. In conjunction with the provision that SUPs are subject to the law of the State in which they are registered, it could jeopardise employees' participation rights, but also enable circumvention of national tax law."⁴⁹

That being said, this is already a fact of life in relation to company incorporations, and EU law has leaned in favour of permitting regulatory competition at both pre- and post-incorporation stages.⁵⁰

Provision of a Template Constitution

Clearly it would be a major breakthrough to have an identical constitution available to SUPs across the European Union. It was originally envisaged that a uniform template constitution would form part of the SUP package. The Commission's SUP Proposal was built around the edifice of devising a uniform template corporate constitution/set of Articles which SUP companies would have to adopt.⁵¹ However, while consistency across the Union may seem attractive, national company law differentials rear their head as an objection. It is therefore unsurprising that the uniform articles idea did not carry through to the 2015 Revised SUP Proposal. In the Council's Revised SUP Proposal, the expectation was that Member States would devise their own template constitution rather than a harmonised framework being set down in the Directive itself.⁵² Moreover, the constitution would be governed by national law. Key areas to be dealt with by Member States in devising a template include name, objects, matters relating to the single share, capital rules, day to day management, financial year, registered office and head office as well as the treatment of pre-incorporation contracts.⁵³

⁴⁸ See further SUP Proposal (fn 6), Recital 12.

⁴⁹ European Economic and Social Committee, (fn 27), para. 1.5.

⁵⁰ There is a rich if complex thread of CJEU case law on freedom of establishment: *Centros Ltd v Erhvervs-og Selskabsstyrelsen* C-212/97 [1999] ECR I-1459; *Überseering BV v Nordic Construction Company Baumanagement GmbH* C-208/00 [2002] ECR I-9919; *Kamer van Koophandel en Fabriken voor Amsterdam v Inspire Art Ltd* C-167/01 [2003] ECR I-10155; *Cartesio Okata es Szolgaltato bt* C-210/06 [2008] ECR I-9641.

⁵¹ On this see Reflection Group, (fn 7), p 66.

⁵² SUP Revised Proposal, (fn 14), Art 11.

⁵³ SUP Revised Proposal, (fn 14), Art 11(3).

Management of the SUP

It is proposed that the legal framework for decision-making by the single-member of the SUP would take place in the same manner as currently is provided for single-member companies. This focuses on relatively informal decision-making without the need for formal meeting structures. However, it is not possible for a natural person shareholder to simply informally make decisions in their own head—decisions need to be documented in writing. The decision to retain a requirement of written recording of decision-making by a single-member of an SUP when acting qua the company in general meeting and when entering into contracts with the company is sensible.⁵⁴

In accordance with Article 22 of the SUP Proposal, management of the SUP is by means of a “management body” comprising one or more directors. The decision-making structures within a single-member company have always been of interest given the possibility of self-interested decision-making and decision-making which does not respect traditional company law distinctions between the separate legal personality that is the company, the board of the company and the company in general meeting as represented by the single-member. The SUP Proposal leaves open the possibility of a single or two tier board consisting of a management body and a supervisory board which is appropriate given that both structures are represented at Member State level, with a unitary board structure being the norm in Ireland and the UK.

The proposed power balance within the SUP has evolved from the original SUP Proposal with regulation giving way to national sovereignty. The original specification that the single-member had the power of director removal⁵⁵ has been deleted. Interestingly, in the original proposal the single-member was given the right “to give instructions to the management body” in Article 23(1) but Article 23(2) went on to clarify that these were to be considered non-binding if not permitted to be mandatory by the single-member company’s articles or applicable national law. The provision of binding instructions to the board of directors would be problematic under the Irish Companies Act 2014 where the general power of management is delegated to the directors by virtue of s 158 of the Companies Act 2014. Directors can only be given directions by the single-member by means of the single-member using its power to amend the constitution of the company. It is therefore beneficial that the shareholder instruction provision in Article 23 was removed from the 2015 Revised SUP Proposal.

It would appear that it will be for the SUP to specify the requisite number of directors in its constitution. In Ireland this lines up well with the introduction of single director private companies for the first time in the Companies Act 2014. However, some particular challenges do rear their head in the Irish corporate law landscape. Unlike the position in many jurisdictions, corporate directors are not permitted.⁵⁶

⁵⁴ Revised SUP Proposal (fn 14), Art 4(2).

⁵⁵ SUP Proposal (fn 6), Art 22(5).

⁵⁶ s 130 of the Companies Act 2014 expressly prohibits a body corporate from acting as a director.

Furthermore, putting a dampener on the possibility of a true sole trader vehicle, Irish companies are required to have a company secretary and the director and the company secretary cannot be the same person.⁵⁷ Therefore the involvement of a third party in the administration of the company's affairs continues to remain necessary. The SUP Proposal and Revised SUP Proposal are silent on the issue of a company secretary, leaving the matter to national law.

Creditor Protection

The liability of the single-member of an SUP would be limited to an amount corresponding to the subscribed share capital which may be as low as €1 under the minimum capital rule set out in Article 16(1) of the Revised SUP Proposal. This is familiar terrain to the Irish company lawyer but anathema to those who believe in the value of requiring entrepreneurs to put a less derisory amount of capital on the table before they can be afforded the benefits of limited liability.⁵⁸ The Commission's view in relation to the SUP and minimum capital aligns with that in evidence in relation to the predecessor SPE – high minimum capital requirements are regarded as an unjustifiable barrier to trade. This was one of the most divisive issues in relation to the SPE but the minimalist approach to capital has been retained in both the Commission's SUP Proposal⁵⁹ and the Council's Revised SUP Proposal.⁶⁰ This continues to place the focus for creditors on cash flow indicators.

In Ireland serious capital requirements have not troubled entrepreneurs as they have never formed part of private company policy despite the existence of complex rules concerning the maintenance of capital.⁶¹ The issue of setting very low capital requirements has always been at the centre of the argument that low capital requirements represent a race to the bottom in terms of competing in the market for corporate incorporation. The minimal capitalisation requirements of the SUP will attract criticism from those who favour more robust capitalisation of companies from the outset and through mandatory continuing reserve building post-incorporation. The initial policy in the SUP Proposal was that Member States would not be permitted to require SUP companies to accumulate legal reserves.⁶² This was softened in the Revised SUP Proposal to allow Member States should they so wish to require companies to maintain a percentage of profits as reserves.⁶³ Obviously national choices in this respect would be keenly observed in making a competitive decision as to where to incorporate.

It was contemplated in the original SUP Proposal that the Directive would make provision for a balance sheet test of solvency and for the provision by the directors

⁵⁷ s 134 of the Companies Act 2014.

⁵⁸ See M Miola, *Legal Capital and Limited Liability Companies: The European Perspective*' (2005) 4 ECFR 413; M Zurek, K Szemia, 'Capital Maintenance' in M. Siems and D. Cabrelli (eds), *Comparative Company Law: A Case-Based Approach* (Hart Publishing, 2013).

⁵⁹ SUP Proposal (fn 6), Art 16(1).

⁶⁰ SUP Revised Proposal, (fn 14), Art 16(1).

⁶¹ J Armour, 'Legal Capital: An Outdated Concept?' (2006) 1 EBOR 5.

⁶² SUP Proposal, (fn 6), Art 16(4).

⁶³ SUP Revised Proposal, (fn 14), Art 16(3).

of a solvency statement before making any distribution to the sole member so as to guard against the possibility that this would lead on a cash flow basis to the insolvency of the company within the following year. These measures were designed to allay the fears of those who were concerned with the creditor protection implications of a very low capital requirement.⁶⁴ In the Council's 2015 Revised SUP Proposal, more discretion was given to Member States in relation to the design of appropriate creditor protection measures including measures to prevent excessive distributions.⁶⁵ This made the solvency statement an option for Member States to consider rather than imperative. There may of course be a conflict of interest in making a solvency statement in one-director companies where the director and single-member overlap. This could be addressed at national level by requiring independent certification.

The Future of the SUP Proposal

The SUP Proposal can be seen as a maturing of EU corporate law policy based on policy refinement over time to adjust to the political temperature.⁶⁶ This is also reflected in the choice of legal basis. The legal basis of the SUP Proposal is Article 50 TFEU which provides competence to act in matters relating to company law and does not require unanimous support.⁶⁷ Rather it comes within the ordinary legislative procedure whereby the Council and the European Parliament will need to agree on a common position. Whether the necessary agreement is reached or whether the Directive on SUPs will suffer the same fate as the Directive on SPEs remains to be seen. Significantly, the ill-fated SPE predecessor had relied on a more general provision now contained in Article 352 TFEU, designed to achieve Community objectives.¹ The difficulty with Article 352 is that, while broad-ranging in scope, it requires the Council to act unanimously and thus requires across the board support from Member States which is supremely challenging to achieve. This was a sword upon which the SPE Proposal fell once dissent emerged.

Consequently, any assessment of EU reform proposals in the sphere of close corporations must necessarily take cognisance of the *realpolitik* behind EU proposals which often do not achieve the requisite support to carry them to fruition or which are adopted in a final form bearing little resemblance to how they began life. Despite revisions made to the SUP Proposal at Council level, the SUP Proposal continues to attract controversy and as such the likelihood of its adoption as a

⁶⁴ F Dias Simões, 'Legal Capital Rules in Europe: Is There Still Room for Creditor Protection?' (2013) 23 ICCLR 166; E Ferran, 'The Place for Creditor Protection on the Agenda for Modernisation of Company Law in the European Union' (2006) 3 ECFR 178; MM Siems, L Herzog and E Rosenhager, 'The Protection of Creditors of a European Private Company' (2011) 12 EBOR 147.

⁶⁵ SUP Revised Proposal, (fn 14), Art 18.

⁶⁶ On EU company law policy generally see J Armour and WG Ringe, 'European Corporate Law 1999-2010: Renaissance and Crisis' (2011) 48 CML Rev 125; J Armour, S Deakin, P Lele, M Siems, 'How Do Legal Rules Evolve? Evidence from a Cross-Country Comparison of Shareholder, Creditor and Worker Protection' (2009) 57 Am J Comp L 579.

⁶⁷ Notably Article 50(2)(f) TFEU also refers to the setting up of branches, a matter which remains outside the scope of the current SUP proposal.

Directive remains subject to considerable uncertainty. Company law scholars who follow the path of potential EU reforms for close corporations with interest have been suitably chastened by the political nature of the territory and the abandonment of the SPE project after a huge investment of time and energy. Although the SUP project is far less ambitious in scope, the same political tensions around regulatory competition and creditor protection which plagued the SPE continue to raise hackles for the SUP. A continuing refrain is that company founders would be motivated to establish letter box SUP companies in Member States where social protection for workers is weakest and the corporation tax regime most favourable. A particular blow to the SUP project was dealt in June 2015 when the Employment and Social Affairs Committee of the European Parliament rejected the Revised SUP Proposal, concerned that there were insufficient protections for workers' and consumers' rights.⁶⁸ Subsequently the Legal Affairs Committee considered the SUP Proposal and postponed a decision on it. Following the Panama papers revelations in 2016 there have been mounting misgivings concerning the fact that the SUP in not requiring 'real seat' by aligning place of business and place of registration would readily facilitate letterbox companies. Further developments and decision-making must now be awaited.

IV. Conclusion

If adopted, the contribution which the provision of a special single member company designated as an SUP is likely to achieve within the EU is likely at best to be incremental and modest rather than ground-breaking. The modesty of ambition coupled with the less onerous voting requirements predicated on adoption of the Directive by qualified majority under the ordinary legislative procedure might lead one to believe that the adoption of the SUP Directive may be politically achievable in a way the SPE Regulation was not. That, however, is open to serious doubt given the many voices which have been raised against it leading to a perceptible loss of political momentum. More fundamentally, at base level the key question persists of whether there is a commercial need for the SUP or whether it is white elephant, a hangover from the Commission's idealism concerning the goal of creating a harmonised approach to entity design which it clung to in the earlier ill-fated SPE project. While the SUP could achieve its objective of reducing domestic set-up costs in Member States which have not embraced electronic registration, availing of it cross-border would be far from cost-neutral, necessitating comprehensive legal advice on national company law and other forms of mandatory law impacting on the operations of the subsidiary such as health and safety law, employment law, competition law, and the law relating to the sale of goods and supply of services.

Looking then at a macro-level at the SUP's place within the corpus of European company law, while the SUP could represent a welcome development on some fronts, its confinement to single-member companies represents a considerable lessening of ambition as regards the provision of a multi-member European private company model. The single-member company model has, however, the advantage

⁶⁸ *Opinion of the Committee on Employment and Social Affairs on Regulatory Fitness and Performance Programme (REFIT): State of Play and Outlook 28.5.2015*, para. 19.

of a quarter century of being tried and tested. It is therefore familiar. Nonetheless, focusing on the untapped potential of the SUP as regards corporate groups⁶⁹ simply serves to highlight other areas of company law which are crying out for a policy review including the duties of directors in a group context. In conclusion, it seems appropriate to record that with the SUP European company law is clearly to find an appropriate calibration between harmonisation and national sovereignty and is doing so suitably chastened by the long-drawn out death of the SPE proposal. Finding that regulatory balance is crucial to the success of the SUP project. However, regardless of the success or otherwise of the SUP Proposal, it is clear that the *Centros*⁷⁰ effect, propelling regulatory competition and cross-fertilisation of regulatory perspectives among Member States, will continue to remain a robust influence on national company law development in the EU.

⁶⁹ See generally S Jung, 'Societas Unius Personae (SUP): The New Corporate Element in Company Groups' (2015) 26 Eur. Bus. L. Rev. 645; C Teichmann, 'Corporate Groups within the Legal Framework of the European Union: The Group-Related Aspects of the SUP Proposal and the EU Freedom of Establishment' (2015) 12 ECFR 202.

⁷⁰ *Centros Ltd v Erhvervs-og Selskabsstyrelsen* C-212/97 [1999] ECR I-1459.

