

ETUC position on single-member private limited liability companies

Adopted at the Executive Committee Meeting of 11-12 June 2014

Summary

- The proposed SUP generates serious concerns with regard to fiscal evasion, workers' rights and sustainable corporate governance in general. If adopted, this Directive would be an open invitation to companies of all sizes to minimise their responsibilities under national law.
- Genuine SMEs, especially if they are one person-businesses, normally conduct their activities at local level. Therefore, the added value of an EU intervention for such companies is highly questionable. Furthermore, the ETUC cannot accept that the simplified rules contained in the SUP could be misused by large companies to circumvent more elaborated EU company law forms such as the European Company ('the SE').
- The ETUC rejects the SUP Directive and urges the EU institutions to work together with the social partners to find appropriate solutions for a sustainable approach to EU company law:
 - Prior to any further initiative on company law, the EU legislator must devise the appropriate rules so as to ensure that the registration place is linked to the place of main business.
 - Registration procedures must provide the necessary guarantees for verification of the identity of the company founder and its good repute.
 - Satisfactory safeguards must also be put in place to guarantee the sound financial behaviour of the company, including a substantial capital base. This is necessary to secure the necessary liability towards clients, creditors and the workforce.
- The ETUC cannot accept that workers' rights to information, consultation and board level representation are diluted or bypassed.

Position

On 9 April 2014, the European Commission published a proposal for a Directive on single-member private limited liability companies ('the SUP')¹. This initiative is a follow-up to the controversial proposal for a European Private Company Statute ('the SPE'), published in 2008 and which eventually had to be withdrawn by the Commission.

Like the SPE, the announced objective of the SUP is to facilitate business environment for SMEs, which appear to find it costly to be active across borders for reasons including the diversity of national legislations. The Directive would introduce uniform rules on formation of an SUP, registration procedure including provisions for an online registration, minimum share capital of 1 euro, and template of articles of association.

Already at the time of the SPE, the ETUC had stressed that enhancing flexibility for SMEs cannot be done to the detriment of workers' rights. The ETUC had strong concerns that the proposed SPE Statute would come across as an encouragement to set up letterbox

¹ COM (2014) 212 final <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1398680773110&uri=COM:2014:212:FIN>

companies. A number of vital improvements were therefore indispensable for the ETUC to be able to support such an initiative².

Far from addressing these shortcomings, the proposed SUP generates even more concerns with regard to circumvention of fiscal evasion, workers' rights and sustainable corporate governance in general. If adopted, this Directive would be an open invitation to companies of all sizes to minimise their responsibilities under national law.

The ETUC rejects the SUP Directive and urges the EU institutions to work together with the social partners to find appropriate solutions for a sustainable approach to EU company law.

An undemocratic initiative

The Commission conducted two broad online public consultations, then followed by meetings with business representatives. Clearly, the SUP initiative builds on a process biased towards the business world. A consultation which brings on the same footing individual company founders and an organisation representing millions of workers cannot be considered as genuinely representative.

Given the impact of the SUP on stakeholders in general and workers' rights in particular, there is no doubt that this topic is in the heart of the social policy field" as mentioned in Article 153 TFEU. European Social Partners should have been consulted in a different way, with a different weight and at an earlier stage than the wider public so as to allow them to influence the direction of the initiative to be taken.

Furthermore, the choice of the legal base raises serious questions as to the respect by the Commission of basic democratic principles. The previously proposed Regulation for SPE was based on Article 352 TFEU requiring unanimous agreement in Council, whereas the newly proposed Directive is based on Article 50 TFEU, which requires qualified majority voting. The ETUC strongly disagrees with this approach. The SUP is a direct follow-up to the SPE. Yet, rather than addressing the real roots for concerns, the Commission is trying to sidestep objections by changing the legal base.

The Commission argues that because it is a Directive, which has to be implemented by national legislation, the SUP is not a supra national legal form (which would have required Art 352TFUE as a legal base). This analysis is flawed. In theory, existing national laws on single-member private limited liability companies could co-exist with the new SUP rules. But any stricter provisions in national law would be easily by-passed by company founders to the profit of the SUP. In other words, the SUP will establish the maximum level of regulation with regard in particular to creditors' protection.

Further, although the proposed initiative takes the form of a Directive, uniform rules on a series of key company law elements would be introduced (formation of an SUP, registration procedure including provisions for an online registration, minimum share capital, and template of articles of association). Worryingly some of these uniform rules will be left to comitology, outside any kind of democratic scrutiny by the EU legislator. For instance, rules relating to matters as important as capital reduction or accounts will be decided on unilaterally by the Commission. The ETUC is deeply concerned by this undemocratic approach, and urges the European Parliament, the only directly elected institution, to stand up for its prerogatives as a co-legislator.

A real need?

The ETUC has strong doubts on whether it is necessary to create a supranational form for SUPs. Genuine SMEs, especially if they are one person-businesses, normally

² <http://www.etuc.org/sites/www.etuc.org/files/11- EN-ETUC Position on a EPCS Resolution En 1 2.pdf>

conduct their activities at local level. The added value of an EU initiative on SUPs is highly questionable for such businesses, and the ETUC is concerned about the respect of the subsidiarity principle. For the SUP form to have concrete impact, it would have to be used by larger businesses to the detriment of more elaborated EU company law forms such as the European Company ('the SE'). In other words, the SUP Directive would weaken the historic compromise reached in the SE legislation, in particular with regard to the provisions on workers' rights.

An encouragement to use letterbox companies

The proposed SUP Directive expressly allows the SUP to locate its registered office in a different Member State than the central administration. In fact, the company founder is free to locate the registered office in the Member State of its choice. This situation is not new but would be considerably worsened by an EU initiative transforming registration procedures into a simple formality. Under the SUP, the rules relating to registration are significantly simplified, including in particular rules for online registration. The registration process is entirely dematerialised and provides no safeguard to verify the identity and good repute of the company founder.

The choice of the registration place is an important step in the life of a company as it determines the main national regime applicable to the company. This has implication in particular for tax. Unrestricted freedom to pick and choose the place of registered seat facilitates fiscal evasion. In the field of social security coordination, there is also a risk of circumvention of mandatory contributions by the employer.

Also, the proposed SUP contains no safeguard to prevent larger companies to misuse this company form. Larger companies will be encouraged to artificially modify their corporate structure with a view to minimise their obligations under the normally applicable national law. A company employing a significant number of workers in a Member State with elaborated legislation on information, consultation and workers' board level participation could easily "transfer" the ownership of some of its activities to a subsidiary established as an SUP in a more lenient Member State, thereby circumventing the applicable obligations in the Member State where the business is actually carried out.

The way forward – key elements to a sustainable company law model

Prior to any further initiative on company law, the EU must urgently solve the problem of letter box companies established for the purpose of fiscal optimisation and circumvention of workers' rights. The ETUC considers that the 'real seat' principle must become a core principle of EU company law. The ETUC therefore urges the EU legislator to devise the appropriate rules so as to ensure that the registration place is linked to the place of main business.

Further, registration procedures must provide the necessary guarantees for verification of the identity of the company founder and its good repute.

Satisfactory safeguards must also be put in place to guarantee the sound financial behaviour of the company. In particular, a substantial capital base can provide a basic level of protection for workers and other stakeholders when companies run into financial difficulties. The ETUC rejects the 1euro minimum capital requirement contained in the SUP proposal. Combined with a simplistic online registration procedure, the 1 Euro minimum capital requirement is an open invitation to fiscal and social dumping. It must also be noted that the SUP proposal contains almost no guarantee in case of bankruptcy towards clients, workers and creditors.

Last but not least, the ETUC cannot accept that workers' rights to information, consultation and board level representation are diluted or bypassed, as would be the case with the SUP. Every new EU company law initiative must imperatively contain

provisions on workers' involvement, at least on the same level as those contained in the SE Directive. In the longer term, what would make discussion on European company legislation much easier would be a legal framework on workers' information, consultation and board-level representation that applied to all such proposals.