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The relationship between the *Societas Unius Personae* proposal and the *acquis*: Creeping Toward an Abrogation of EU Company Law?

by

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This article investigates several implications of the Commission's new SUP Proposal and examines some of its key features. As currently formulated, the SUP Draft Directive presents some peculiarities that must be understood in the context of recent history in EU company law, particularly the Commission's now-abandoned SPE Proposal. The SUP Proposal engenders concern that certain problems will arise in coordinating the SUP Draft Directive (if adopted as proposed) and the EU acquis *on company law. More precisely, exploring if and to what extent SUPs may be subject to the existing European company law directives, I argue in favor of the inclusion of this new legal form within the scope of the EU* acquis. *I conclude this article defending the possibility of continuing positive harmonisation of European company law.*

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I. Introduction

On April 9, 2014, the European Commission published a proposal for a new directive (the "SUP Initiative")[1] that would replace Dir. 2009/102/EC on single-member private limited liability

[1] The actual 'Proposal for a directive of the European Parliament and of the Council on single-member private limited liability companies', COM(2014) 212 final, 2014/0120 (COD), Brussels, 9 April 2014, is hereafter the 'SUP Proposal', which consists of both the Explanatory Memorandum (hereafter the 'SUP Explanatory Memorandum') and the proposed directive (hereafter the "SUP Draft Directive"). After the publication of the proposal, as of February 2, 2015, the most relevant official working documents concerning this proposal that have been made public are: the 'Opinion of the European Economic and Social Committee', Brussels, 10 September 2014 (hereafter the "Opinion of the EESC"); the 'Opinion of the Council's legal service', Brussels, 17 October 2014, concerning the legal basis of the proposal; the 'Proposal for a directive of the European Parliament and of the Council on single-member private limited liability companies', Brussels, 1 December 2014, presented by the Italian presidency of the Council; the 'Note to the proposal for a directive of the European Parliament and of the Council on single-member private limited liability companies', Brussels, 18 December 2014, all available at http://consilium.europa.eu (last visited March 30, 2015). Even if the SUP Proposal was only published on April 9, 2014, it has already given rise to an interesting academic debate, which, unfortunately, has not yet really crossed national borders. Among the most interesting contributions to this debate, in addition to the articles published in the current issue of this review, see Αλεξανδροπουλου, 'Societas Unius Personae ("SUP"), η νέα εταιρική μορφή', ΧρΙΔ (2014), 629; Anker-Sørensen - Sjåfjell, 'Vår Europeiske Selskapsrett (Our European Company Law)', available at http://ssrn.com/abstract =2532861 (last visited January 27, 2015); Bauer - Weller, 'Europäisches Konzernrecht: vom Gläubigerschutz zur Konzernleitungsbefugnis via Societas Unius Personae', ZEuP (2015), 6; Beurskens, '„Societas Unius Personae" – der Wolf im Schafspelz? – Der Vorschlag für eine Richtlinie über Gesellschaften mit beschränkter Haftung mit einem einzigen Gesellschafter –', GmbHR (2014), 738; Boschma,'Het plan voor een nieuwe EU-richtlijn voor de eenpersoonsvennootschap: Is de voorgestelde nieuwe rechtsvorm van de SUP een goed idee?', Ondernemingsrecht (2014), 17, 144, 725; Cappiello, 'Proposta di direttiva SUP: possibili implicazioni, rischio di abuso e considerazioni sull'armonizzazione del diritto nell'area UE', Studi e Materiali (2014), 661; Dreher, 'Der Richtlinienvorschlag über die Societas Unius Personae und seine Regelungen zur faktischen Geschäftsführung', NZG (2014), 967; Drygala, 'What's SUP? Der Vorschlag der EU-Kommission zur Einführung einer europäischen Einpersonengesellschaft (Societas Unius Personae, SUP)', EuZW (2014), 491; Eickelberg, 'SUP, EGVP, ePerso und XML - Die schöne neue (digitale) Welt der GmbH-Gründung', NZG

companies. The SUP Draft Directive is divided into two parts: the first part largely follows the original structure of Dir. 2009/102/EC with some relevant differences, describes the scope of the new directive, provides some definitions, and imposes certain obligations on any legal entity that becomes a "single-member company" within the new directive's definition. The second part, which represents the substantive aspect of the new directive, grants the Member States a choice between either (a) providing for the establishment of a *Societas Unius Personae* (hereinafter, sometimes "SUP") "as a separate company law form which would exist in parallel with other forms of single-member private limited liability company provided for in national law",[2] or (b) applying the provisions of that part of the directive devoted to the SUP to "all single-member private limited liability companies so that all such companies would operate and be known as SUPs".[3]

The SUP Proposal presents innovative features and, arguably, reinvents the role of company law directives as a tool to strengthen integration within the internal market. On the one hand, it gives Member States the chance to introduce a new national legal entity, with characteristics different from those already provided by the EU *acquis* on limited liability entities. On the other hand, this initiative cannot be considered a harmonisation directive in a strict sense, as, in contrast to previous European company law directives, the SUP Proposal is not intended to further coordinate and make equal safeguards protecting shareholders and third parties.

(2015), 81; Fleischer, 'Internationale Trends und Reformen im Recht der geschlossenen Kapitalgesellschaft', NZG (2014), 1081; Gongeta, 'Promjene regulatornog okvira njemačkog društva s ograničenom odgovornošću kao posljedica regulatorne konkurencije u području prava društava među državama članicama Europske unije', 35 Zb. Prav. fak. Sveuč. Rij. (2014), 819; Guidotti, 'The Proposal for a Directive on Single-Member Private Limited Liability Company (Societas Unius Personae) from the Italian Perspective', NDS (2015), n. 5, 96; Hommelhoff, 'Die Societas Unius Personae: als Konzernbaustein momentan noch unbrauchbar', GmbHR (2014), 1065; Hommelhoff - Teichmann, 'Die Wiederbelebung der SPE', GmbHR (2014), 177; Jung, 'Societas Unius Personae (SUP) – Der neue Konzernbaustein', GmbHR (2014), 579; Koster 'EU Legal Entities: New Options?', ECL (2015), 5; Lecourt, 'La Societas Unius Personae : La nouvelle société unipersonnelle à responsabilité limitée proposée par la Commission européenne', Rev. soc. (2014), 699; Licini, 'La "*Societas unius personae* (SUP)" europea: ombre liberiste e abusi annunciati', Notariato (2014), 229; Lucini, 'En torno al Proyecto de Directiva europea sobre la Sociedad Limitada Unipersonal (SUP) presentado por la Comisión Europea el 9 de abril de 2014', La Ley mercantil (2015), 24; Malberti, 'La proposta di direttiva sulla *societas unius personae*: una nuova strategia per l'armonizzazione del diritto societario europeo?' Riv. soc. (2014), 848; Mambrilla Rivera, 'Propuesta de Directiva relativa a las sociedades unipersonales privadas de responsabilidad limitada unipersonal', Rev. Derecho Soc. (2014), 531; Neville - Sørensen, 'Promoting Entrepreneurship – The New Company Law Agenda', EBOR (2014), 545; Omlor, 'Die Societas Unius Personae – eine supranationale Erweiterung der deutschen GmbH Familie', NZG (2014), 1137; Ries, 'Societas Unius Personae – cui bono?', NZG (2014), 569; Schmidt, 'Der Vorschlag für eine Societas Unius Personae (SUP) – super oder suboptimal?', GmbHR (2014), R129; Schmidt, 'Die Societas Unius Personae (SUP) – eine neue „europäische" Option für Familienunternehmen?', FuS (2014), 232; Schoenemann, 'Bauen am Baustein für einen europäischen Konzern – Der Richtlinienvorschlag der Kommission zur SUP', EWS (2014), 241; Seibert, 'SUP – Der Vorschlag der EU-Kommission zur Harmonisierung der Einpersonen-Gesellschaft', GmbHR (2014), R209; Serra, '*Societas Unius Personæ* (SUP) – Um *Golem* na União Europeia?', 12 DSR (2014), 127; Teichmann, 'Der Beitrag der Societas Unius Personae (SUP) zur grenzüberschreitenden Niederlassungsfreiheit', NJW (2014), 3561; Teichmann - Fröhlich, 'Societas Unius Personae (SUP): Facilitating Cross-Border Establishment', 21 MJ (2014), 536; Wicke, 'Societas Unius Personae – SUP: eine äußerst wackelige Angelegenheit', ZIP (2014), 1414; Wuisman 'The Societas Unius Personae (SUP)', ECL (2015), 34.

[2] SUP Draft Directive at Recital 10.

[3] Id.

While this innovative strategy has some strengths, it also casts doubt on its practical implementation and coordination with the existing European company law. This article suggests that the content of the SUP Proposal, as well as the Commission's new approach, should be considered, primarily, in light of the difficulties faced by the *Societas Privata Europaea* (sometimes hereinafter "SPE"), which was recently abandoned by the European institutions.[4] From this perspective, it is difficult to predict if the SUP Proposal will be successful; surely, as currently formulated, it raises questions whose answers may have consequences that go far beyond rules that govern single-member companies and affects the scope, nature, and goals of European company law.

This article is divided in four parts. After this introduction, Part II examines some key features of the SUP Draft Directive. Some of the positions adopted in the SUP Initiative were already discussed at length in the context of the SPE Proposal, while others are new and derive either from the new legislative strategy of the Commission or from the substance of the SUP Proposal. Part III investigates how the Commission's approach to strengthening integration within the internal market might be coordinated with the goals and the substance of European company law. In this part, I also examine the benefits of continuing positive harmonisation of European company law as an alternative to this new Commission's approach. Part IV concludes this article.

II. The SUP Proposal's most relevant features in light of the acquis

1. The legal basis

An innovative aspect of the SUP Initiative concerns the legal basis on which it is founded. Unsurprisingly, the SUP Proposal broadly relies on Art. 50 TFEU as its legal basis, a solution that – apparently – reflects the approach taken in Dir. 2009/102/EC and the other company law harmonisation directives. The SUP Draft Directive, however, does not specify which particular part of Art. 50 TFEU would allow enactment of the legislation, and the answer to that question – that is, Art. 50(2)(f) TFEU – may be found in the SUP Explanatory Memorandum,[5] which also makes clear that the Commission firmly believes the legal basis for the SUP Proposal should not be Art. 352 TFEU.[6]

This rather technical remark is pivotal, as it gives effect to one of the most important decisions that concerns the SUP Draft Directive. When faced with a choice between (a) introducing a supranational legal form like the SE or SCE and (b) adopting a different strategy closer to the existing EU *acquis* on single-member companies, the Commission opted for the latter approach. The important corollary to that decision ensures that adoption of the SUP Draft Directive will not require the Council's unanimous consent.

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4 The 'Proposal for regulation on the statute of a European private company' was withdrawn by the 'Annex to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Regulatory Fitness and Performance (REFIT): Results and Next Steps', COM(2013) 685, Brussels, 2 October 2013, 9.

5 The 'SUP Explanatory Memorandum'(n 1), 5, clearly states that "[t]he proposal is based on Article 50 of the Treaty on the Functioning of the European Union (TFEU), which is the legal basis for the EU competence to act in the area of company law. In particular, Article 50(2)(f) TFEU provides for progressive abolition of restrictions on freedom of establishment as regards the conditions for setting-up subsidiaries."

6 'SUP Explanatory Memorandum' (n 1), 5: "[u]nder these circumstances, Article 50 provides a sufficient legal basis for the proposal and recourse to Article 352 TFEU is not necessary."

The second rather surprising Commission decision with respect to the SUP Draft Directive's legal basis is to specifically identify Art. 50(2)(f) TFEU as the legal basis for the SUP Draft Directive. In the past, Dir. 68/151/EEC and other company law directives coordinated national laws based on authority granted in Art. 50(2)(g) TFEU, a provision that addresses coordination of "safeguards which, for the protection of the interests of members and others, are required by Member States of companies . . . with a view to making such safeguards equivalent throughout the Union". Art. 50(2)(f) TFEU, on the other hand, addresses a completely different issue: the "progressive abolition of restrictions on freedom of establishment in every branch of activity . . . as regards the conditions for setting up agencies, branches or subsidiaries in the territory of a Member State".[7] The reasons underlying the Commission's decision to rely on Art. 50(2)(f) TFEU are not expressly stated in the text of the SUP Draft Directive. However, it is noteworthy that the Commission drastically changed its approach,[8] by proposing a legal basis that was not even used for the Directive on branches.[9]

In fact, as the EESC[10] and some commentators[11] have highlighted, it is debatable if this legal basis would be admissible for the measures included and for the goals pursued by the SUP Proposal. For the moment, however, the Council continues working on the SUP, as its legal service delivered an opinion that recognizes the legitimacy of the legal basis proposed by the Commission.[12]

a). Benefits and limits of introducing the SUP as a national company

By relying on Art. 50 TFEU rather than Art. 352 TFEU as the legal basis for the SUP, the Commission found an innovative way to avoid the difficult political debate that forced it to abandon the SPE Proposal. However, that decision also has another implication that goes beyond simply resolving the need to get a unanimous vote in the Council: by adopting this approach, the Commission makes clear that the SUP is not designed to be a supranational legal form.

Unlike SEs and SCEs, SUPs will not have a European nature, will be governed directly by national law, and will only be indirectly affected by EU legislation. In the end, there will not be a single form of SUP, but as many SUPs forms as there are Member States. Such SUPs will share a common name (*Societas Unius Personae*)[13] and be subject to the few rules and principles set

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7 For further information on the past discussions regarding the appropriateness of the legal bases offered for Dir. 89/667/EEC or, more recently, Dir. 2009/102/EC, see, e.g., Edwards, *EC Company Law* (1999), 221 f.; Habersack - Verse, *Europäisches Gesellschaftsrecht* (2011), 4. Aufl., 351 f.

8 Even in detailed investigations into the legal basis of European company law, no analysis of Art. 50(2)(f) has developed. See, e.g., Vossestein, *Modernization of European Company Law and Corporate Governance: Some Considerations on Its Legal Limits* (2010), 45 ff.; Grundmann - Glasow, *European Company Law* (2012) 2nd ed., 53 ff.

9 In fact, Dir. 89/666/EEC, in its first Recital, makes an explicit reference to Art. 54(3)(g) of the Treaty establishing the European Economic Community, which is now Art. 50(2)(g) TFEU.

10 Opinion of the EESC (n 1), 1.2 and 4.1.

11 See e.g. Serra (n 1), 130; Mambrilla Rivera (n 1), 535 f.; Lecourt (n 1), 700 f.; Omlor (n 1), 1138; cf. Αλεξανδροπουλου (n 1), 630; Drygala (n 1), 493.

12 Opinion of the Council's legal service (n 1).

13 Apparently that point became evident during the discussion at the Council, since Art. 7(3) of the Proposal for a compromise presented by the Italian presidency requires that SUPs indicate, in addition to the acronym SUP,

forth in the EU-level directive, but beyond that, each national SUP will remain a distinct national legal form.[14] In this context, it is more likely that, even a cross-border transfer of seat of such entities – to the extent such transfers will be possible – will be considered a cross-border conversion.[15]

In brief, when compared to the SE, SCE and the SPE Proposal, the SUP Draft Directive renounces a great deal of potential uniformity in exchange for little, if any, apparent benefit for the merits of the provisions that will govern these many SUPs.[16] The reasons that led the DG Internal Market and Services to opt for this arguably inferior legislative strategy are essentially political and can be traced back to the difficulties faced by the SPE Proposal.[17] Surely, since a harmonisation directive may be adopted with the ordinary legislative procedure under Art. 50 TFEU – that is, without a unanimous vote of the Council – it will certainly be less difficult to enact the SUP Proposal.

The obvious criticism of the Commission's innovative approach is that, in principle, the choice of legal basis should define the scope of the initiative and its legislative process. Yet, for the SUP Proposal, it seems that the Commission's choice of legal basis was driven by the desire to take advantage of the ordinary legislative procedure and that the limited scope of the SUP Draft Directive was a consequence of this choice.[18]

b). The SUP and the introduction of a new legal form

Introducing the SUP by means of a directive, rather than a regulation, also has another implication. The SUP Explanatory Memorandum confirms that the Commission intentionally

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their Member State of registration. On this point, see also Conac, 'The Societas Unius Personae (SUP) : a « passport » for job creation and growth', in the current issue of this review, --.

14 Hence, it is difficult to agree with former Commissioner Barnier, who, while presenting the SUP Proposal, said that this legal entity will function the same way anywhere in the Union, see Barnier, 'Présentation d'un train de mesures sur la Gouvernance des entreprises', Brussels, 9 April 2014, available at http://europa.eu/rapid/press-release_SPEECH-14-310_en.htm (last visited May 10, 2014), 3. Quite the opposite, since the scope of the SUP Proposal is narrow, when compared to existing detailed national legislation on private limited liability companies, the various Member States' SUPs will certainly not function the same way across all of the different legal systems.

15 Obviously, in accordance with the principles mandated by EU legislation and the CJEU's jurisprudence. On cross-border conversions, see, in particular, ECJ, 16 December 2008, Case C-210/06, *Cartesio* [2008] ECR I-9641, n. 111 ff., and, in general, ECJ, 12 July 2012, Case C-378/10, *VALE Építési kft*.

16 On this point it is sufficient to recall the words of the Opinion of the Advocate General Stix-Hackl, 12 July 2005, Case C-436/03, *Parliament v. Council* [2006] ECR I-3735, n. 54. In commenting on the choice to use a regulation for enacting the Statute for a European Cooperative Society, she said: "[i]n this particular case the reason for choosing the form of a regulation was that a directive would first have had to be transposed into national law. This would have led in turn to a large number of implementing provisions, which would each have applied only in the territory of the particular Member State concerned. Hence, the advantages that a regulation offers would not nearly have been achieved because a regulation can create uniform law of direct application. A regulation that creates an additional legal form thus enables the Community legislature to resolve such territoriality problems."

17 Even Commission Barnier, when presenting the SUP Proposal, acknowledged the difficulties encountered by the SPE proposal and suggested the need for a different strategy, Barnier (n 14), 3.

18 See Beurskens (n 1), 738 f.; Jung (n 1), 579 f.; Schmidt, 'Der Vorschlag'(n 1), R130; Seibert (n 1), R209; Serra (n 1), 130 f.; Lecourt (n 1), 700 f.

rejected the option of making the SUP a supranational legal form. Yet, the SUP Draft Directive also clearly acknowledges that its transposition into national law may result – if a Member State opts for this approach – in the creation of a new form of legal entity.[19] The SUP Draft Directive gives Member States two options when transposing its second part: Member States may either (a) add a new form of SUP to their existing list of legal entities that can be created in their jurisdictions, or (b) transpose the rules and principles mandated by the directive, applying them to all single-member private limited liability companies already authorized by national law.[20]

The SUP Draft Directive makes clear that, if the SUP is introduced as a new form of entity, this form of entity could be distinct from any already existing in that Member State's legal system.[21] Thus, the SUP Proposal does not introduce a new supranational entity like the SE or the SCE, rather it gives Member States the right to transpose the directive by introducing a new legal form of entity into their national law.

ba). The introduction of new legal forms in the jurisprudence of the ECJ

The Commission's intention that the SUP not be supranational legal form is important for the Commission to defend its choice of legal basis, since there is authority that suggests that the introduction of supranational forms cannot be justified by Art. 50 TFEU, but only by Art. 352 TFEU.[22] This conclusion has been confirmed by the ECJ, which, in a decision concerning the legal basis of the SCE, held that since this initiative:

> leaves unchanged the different national laws already in existence, cannot be regarded as aiming to approximate the laws of the Member States applicable to cooperative societies, but has as its purpose the creation of a new form of cooperative society in addition to the national forms.[23]

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19 See SUP Draft Directive, at Recital 10. Yet, as Conac (n 13), --, correctly highlights, Member States are not required to introduce the SUP as a new legal form.

20 See, e.g., Jung (n 1), 580 f.

21 This is a crucial aspect of the SUP Draft Directive: if a Member State introduces the SUP as a new form of legal entity, it could hardly be considered a subtype of any existing form of limited liability company in that Member State. Moreover, depending on the specific Member State, strategies put in place for the protection of SUP creditors and other, purely national forms of private limited liability companies may be significantly different, thus it is hard to imagine that changing from one company form to the other could be done without considering the interests of creditors. Finally, as Dir. 2012/30/EU is not applicable to private limited liability companies and as Member States adopt heterogeneous approaches to creditor protection, it is also worth noting that, depending on the national legislation, it is difficult to predict in each legal system, as between SUPs and purely national private limited liability companies, which company form may better protect creditors than the other. On the possibility of considering the SUP as a subtype of private limited liability entities, see Hommelhoff (n 1), 1069 f.; Jung (n 1), 580 f.; Seibert (n 1), R209; Serra (n 1), 147 f.; Wicke (n 1), 1414; Conac (n 13), --.

22 The problem of the legal basis for optional instruments is not new and, recently, it has been carefully examined in the context of the Proposal for a Regulation on a Common European Sales Law. Without reviewing the debate on that proposal's legal basis, it is sufficient to note that, in that controversy, an important point was made by supporters of the idea that the regulation could be adopted following the ordinary legislative procedure when, on June 8, 2012, Commissioner Reding communicated that the Council's legal service found the Commission's suggested legal basis (Art. 114 TFEU) valid.

23 ECJ, 2 May 2006, Case C-436/03, *European Parliament v. Council* [2006] ECR I-3754, n. 44.

Thus, the ECJ made clear that introducing new forms of cooperative societies cannot be considered an authentic approximation, since existing national law remains in place, existing national law addressing cooperatives remained unchanged, and the new SCE was simply to be added to the list of the legal entities available in each Member State. Hence, in that decision, the ECJ concluded that the Council did not err in finding that Art. 352 TFEU (at that time Art. 308 of the EC treaty) was the correct legal basis for Reg. (EC) 1435/2003.

Obviously, the simple fact that creating supranational legal forms cannot be justified by Art. 50 TFEU does not automatically imply that it is possible to rely on that provision to introduce the SUP as a new national legal entity.[24] In fact, it cannot be taken for granted that Art. 50 TFEU can be used to justify introducing new national legal forms like the SUP. The SUP Proposal probably represents the first time that a European directive is being used to require Member States to create a new form of legal entity in their respective national legislation.[25] As such, the ECJ has not yet had an opportunity to rule on what is (or could be) the appropriate legal justification for this.

Moreover, existing ECJ case law does not provide any particular guidance as to how the Court would ultimately respond if the question were to come before it. However, in the above-mentioned SCE case, the Court simply referred to "a new form" – as opposed a "new supranational form" – of cooperative society that was to be added to the national forms through the Member States' SCE legislations.[26]

bb). The introduction of a new legal form from the perspective of Advocate General Stix-Hackl

Another source of guidance to better understand the problems raised by the legal basis of the SUP Proposal is the opinion delivered by Advocate General Stix-Hackl in the above-mentioned SCE case ("SCE AG Opinion"). In her opinion, the AG opined that while some parts of Reg.

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[24] From this perspective, it would be unwise to rely on the debate surrounding the Proposal for a Regulation on a Common European Sales Law when considering the correct legal basis for the SUP Initiative. In fact, the SUP is not an optional instrument nor does the SUP Initiative introduce a new supranational legal form. Yet, that does not necessarily mean that the legal basis proposed by the Commission is, in fact, correct.

[25] Perhaps, some parallels can be drawn between the SUP Initiative and the introduction of single-member companies by Dir. 89/667/EEC, which, at that time, did not exist in some Member States. For example, see the remarks of Edwards (n 7), 222, on the expressed legal basis for Dir. 89/667/EEC, as that directive "require[d] provision for single-member companies" and not only harmonised safeguards for the protection of the interests of members and third parties. See also Andenas - Wooldridge, *European Comparative Company Law* (2009), 42, who notes that, at the time the single-member company proposal was published, only five Member States authorized such entities. Yet, even if Dir. 89/667/EEC imposed on some Member States an obligation to introduce single-member companies, it did not oblige them to create a new legal form in a strict sense, as such companies were to be introduced within the framework of private limited liability companies.

[26] Interestingly, in response to concerns raised in connection with the Proposal for a Regulation on a Common European Sales Law (C(2012) 9641 final, Brussels 10 January 2013, available at http://ec.europa.eu/dgs/secretariat_general/relations/relations_other/npo/docs/austria/2011/com20110635/com20110635_bundesrat_reply_en.pdf, (last visited May 10, 2014), 2), the Commission argued that the legal basis of that proposed Regulation was different from that of Reg. (EC) 1435/2003, as the former did "not create a new legal form that is also subject to the requirements to conform to a legally defined legal form under national law and can only be introduced by the legislator", but the latter introduced the SCE, which is "a new legal form in addition to the national forms of cooperative societies". Moreover, in that case no specific reference was made to the supranational nature of the SCE.

(EC) 1435/2003, like those concerning the registered office and its transfer, are clearly related to the freedom of establishment, other parts extend beyond that freedom and concern the abolition of restrictions on other freedoms.[27] For that reason, the AG determined that a new European legal form could not be introduced using either the prior iteration of Art. 50 TFEU (Art. 44 EC Treaty)[28] or Art. 114 TFEU (Art. 95 EC) as its legal basis.

In addition, AG Stix-Hackl stated that her conclusions were "not as clear in the case of legal forms that are not independent of national legislation",[29] saying that "[i]t is not finally established, in particular, where the dividing line runs between genuine or completely new legal forms and those new legal forms to which national law also applies".[30] The SCE AG Opinion also suggests that it is not necessary to ascertain if a legal entity like the SCE "is really a 'national company with a European character'"[31] because what really matters "is the legislative content of the regulation".[32] The AG concluded that existing "national law on cooperative societies is not affected by the regulation" and, in addition, "[t]he legal form of an SCE certainly does not replace the legal forms which exist in national law on cooperative societies, but is distinct from them and exists alongside them".[33]

When examined in light of the findings and conclusions expressed in the SCE AG Opinion, the SUP has few characteristics in common with either the SE or SCE, such that it cannot be considered a new European legal form. Moreover, just as the AG suggested that there were aspects of Reg. (EC) 1435/2003 that could not be based solely on the freedom of establishment, certain provisions of the SUP Proposal do not directly concern the freedom of establishment, either. Thus, for these provisions – at least from the perspective of AG Stix-Hackl – Art. 50 TFEU cannot be considered an appropriate legal basis.[34]

A question which, for the moment, is difficult to answer is whether the category "new legal forms" mentioned in the SCE AG Opinion should be understood to include only "new European legal forms" or to include "new national legal forms" too. Undoubtedly, the Commission interprets the phrase to mean the former and the Council's legal service agrees with this conclusion[35]. However, in the SUP Proposal, the Commission has taken this approach to its extreme: it permits a Member State to maintain – almost entirely unchanged – its existing national law and simply add a new company, meeting certain requirements and with a particular name, to the list of available legal entities. Specifically, a Member State may choose to transpose the SUP Draft Directive in such a way that its SUP does not replace any of its existing national

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27 AG Opinion on Case C-436/03 (n 16), n. 44.

28 AG Opinion on Case C-436/03 (n 16), n. 42.

29 AG Opinion on Case C-436/03 (n 16), n. 73.

30 Id.

31 AG Opinion on Case C-436/03 (n 16), n. 75.

32 Id.

33 AG Opinion on Case C-436/03 (n 16), n. 90.

34 Interestingly, the Opinion of the Council's legal service (n 1), n. 32, argued that an evident difference between the SUP and the SCE could be found in the fact that the former does not "provide for the possibility of transferring the registered office", which is one of the few point for which Art. 50 TFEU would surely have been a legitimate legal basis.

35 Opinion of the Council's legal service (n 1), n. 25 ff.

legal forms, such that its SUP will be distinct from and exist alongside those forms.[36] In any case it is hard to imagine that Member States' national company law will remain completely unaffected by the transposition of the SUP Draft Directive. Yet, this does not mean that the introduction of a new national company can be based on Art. 50 TFEU simply because the Member States' law will be somehow affected.[37]

Finally, examining what is now Art. 50 TFEU, AG Stix-Hackl also argued, with a statement whose exact scope and correctness is debated,[38] that

> the coordination requirement also creates a restriction as regards the creation of new forms under company law. Such legal measures could not therefore be based on Article 44 EC.[39]

In conclusion, surely, since Reg. (EC) 1435/2003 left unchanged the different national laws already in existence, it could not be regarded as aiming to approximate the laws of the Member States; however, as the Council's legal service also admits, this does not mean that any measure – like a directive – that does not leave the different national laws untouched would be admissible under Article 50 TFEU.[40]

At least in AG Stix-Hackl's words, it seems that what is needed is an actual coordination of national law actually aimed at the attainment of the freedom of establishment. Ironically, the less invasive the SUP Proposal is for national forms, the more likely it is that it cannot be considered a coordination measure, since the creation of new legal national forms can hardly be considered as approximating existing laws.[41]

c). Art. 50(2)(f) TFEU as the SUP Proposal's legal basis

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[36] In Opinion of the Advocate General Kokott, 22 September 2005, Case C-217/04, *United Kingdom of Great Britain and Northern Ireland v. European Parliament and Council of the European Union* [2006] ECR I-3771, n. 24, which provides some useful comments on AG Stix-Hackl's Opinion, AG Kokott argued that "Advocate General Stix-Hackl's view must be accepted in the case of the creation of new kinds of companies, if they take their place *alongside* the kinds of companies in the individual States' legal systems". Interestingly, also in this dictum, emphasis is given to the fact that simply a new company – not a supranational legal forms – is created alongside the kinds of companies existing in a given Member State.

[37] Cf. the Opinion of the Council's legal service (n 1), n. 28, which argues that "Article 50 TFEU is justified only when the measure in question is designed to approximate the national legislation applicable to company law, and not to create a new legal form of European company which supersedes national forms of companies", but, at n. 30, also concludes that "the SUP is a purely national company, set up on the basis of national provisions and in accordance with those national provisions – even though those provisions may be harmonised – and not a supranational form of single-member company governed first and foremost by an act of the Union and set up directly on the basis of such an act".

[38] Vossestein (n 8), 87, n. 186, and accompanying text.

[39] AG Opinion on Case C-436/03 (n 16), n. 41 f.

[40] Opinion of the Council's legal service (n 1), n. 29, recognizing that the fact that the measure proposed by the Commission is a directive is not "legally decisive" to justify the appropriateness of the legal basis.

[41] However, it should also be noted that the reference to the coordination requirement made by AG Stix-Hackl, even if made generally to Article 44 EC, could also be interpreted as addressing only what is now Art. 50(2)(g) TFEU, where explicit reference is made to the coordination of the safeguards for the protection of the interests of members and third parties.

As previously noted, the SUP Draft Directive simply cites in its preamble Art. 50 TFEU as its legal basis, without further specifying which particular subsection provides the directive's precise legal basis. The SUP Proposal follows the example of Dir. 2009/102/EC, which simply cited Art. 50 TFEU's predecessor, Art. 44 TEC, without any further specificity, in line with other company law directives that were also based on that article. However, it is only in the SUP Explanatory Memorandum that the Commission reveals its significant departure from the traditional legal basis used for company law directives. In the past, the Commission's stated legal basis has been Art. 50(2)(g) TFEU, but for the SUP Proposal, the Commission clearly states that the intended legal basis is Art. 50(2)(f) TFEU, instead. Two different questions raised by this change must be considered: (a) why did the Commission opt for an alternative legal basis for the SUP and (b) is Art. 50(2)(f) TFEU an adequate legal basis for this directive?

ca). The Commission's choice of a different legal basis

The Commission probably rejected Art. 50(2)(g) TFEU as the SUP Draft Directive's legal basis because that provision would have been too narrow to justify the different measures included in the SUP Draft Directive.[42] Even a cursory review of the SUP Draft Directive shows that it is not limited to the simple coordination of safeguards with a view to making them equivalent for the protection of the interests of members and third parties; rather, its scope extends beyond this objective. For example, it is doubtful that the entire second part of the SUP Draft Directive, which allows Member States to introduce the SUP, can even be considered a true coordination measure with respect to national law, as the Member States would still be allowed to maintain, virtually unchanged, their existing company laws, by simply adding the SUP to the list of available national forms of legal entities.

cb). Can Art. 50(2)(f) TFEU be an adequate legal basis for the SUP Draft Directive?

While it is clear that Art. 50(2)(g) TFEU cannot prove a sufficient basis for the SUP Draft Directive, the Commission's choice of Art. 50(2)(f) TFEU is not completely satisfactory, either. Certainly, some parts of the SUP Draft Directive, like those devoted to the SUP's registered office, fall within the scope of subsection (f), as they are directly related to the freedom of establishment. However, other provisions in the SUP Draft Directive, such as those concerning the representative powers of directors or the internal structure of the SUPs, can hardly be considered measures that abolish restrictions on the freedom of establishment.[43] In addition, it is not yet clear whether the Commission's choice of Art. 50(2)(f) for the SUP Proposal may have any impact on the nature or scope of the first part of the SUP Draft Directive, as that part generally follows the structure and wording of Dir. 2009/102/EC.[44]

Moreover, the scope of Art. 50(2)(f) TFEU is limited to setting up agencies, branches, and subsidiaries. Since SUPs will have full legal personality, the SUP Draft Directive arguably only

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42 Cf. AG Opinion on Case C-436/03 (n 16), n. 44.

43 Cf, again, AG Opinion on Case C-436/03 (n 16), n. 44, but also *infra*, n. 54.

44 In fact, in addition to old doubts concerning the appropriateness of the legal basis of Dir. 89/667/EEC and Dir. 2009/102/EC (cf. *supra*, n 7), further uncertainties could arise.

falls within its scope with respect to subsidiaries.[45] Nevertheless, despite the fact that the SUP Initiative is certainly relevant to companies wishing to create subsidiaries in other Member States, the new SUP legal form is also to be made available to natural persons. Hence, the part of the SUP Draft Directive that authorizes natural persons to create SUPs does not fall within a literal reading of Art. 50(2)(f) TFEU.

Furthermore, Art. 50(2)(f) TFEU is intended to promote the "progressive abolition of restrictions on freedom of establishment." Even without considering the merits of existing national law restrictions on the freedom of establishment (something that has yet to be proved),[46] it is worth noting that single-member companies are already profoundly influenced by EU legislation, which has already harmonised substantial parts of national company law that will need to be amended when transposing the SUP Draft Directive.[47]

cc). The coordination between Art. 50(2)(g) and Art. 50(2)(f) TFEU

In this context, the Council's legal service adopted a benevolent approach toward the Commission's choice of Art. 50(2)(f) TFEU as the legal basis of the SUP Proposal. In fact, the opinion of the Council's legal service suggests that, although this provision refers only to the conditions for setting up agencies, branches or subsidiaries, it must be interpreted broadly as also concerning primary establishment – that is, the creation of the new company.[48]

This reading of Art. 50(2)(f) TFEU, however, raises an important problem, that is, that of the coordination between Art. 50(2)(f) and Art. 50(2)(g) TFEU. More precisely, it is difficult to reconcile such a broad interpretation of the former provision provided by the Council's legal service with the argument, also evoked in Advocate General Stix-Hackl's Opinion, that the creation of new forms under company law cannot be based on Article 50 TFEU and with the need to satisfy the "coordination requirement".[49]

In brief, it is difficult to understand why, in company law, the safeguards for the protection of the interests of shareholders and third parties could only be coordinated under Art. 50(2)(g) TFEU, if Art. 50(2)(f) TFEU or, even more broadly, Art. 50(1) TFEU,[50] allows the possibility of enacting directives that, in the pursuit of the attainment of the freedom of establishment, permit the European institutions to create and design the rules applicable to existing and new national forms, including those rules that concern the protection of the interests of shareholders and third parties. From this perspective, it is true that the possibility, recognized by Art. 50(1) TFEU, of enacting directives in order to attain freedom of establishment is not limited to the topics listed in

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45 Cf. Opinion of the Advocate General La Pergola, 16 July 1998, Case C-212/97, *Centros Ltd v Erhvervs-og Selskabsstyrelsen* [1999] ECR I-1459, n. 15, clarifying the distinction between subsidiaries and branches.

46 Cf. *infra*, n 125.

47 On the functions played by 50(2)(g) TFEU, see, e.g., Cotiga, *Le droit européen des sociétés* (2013), 61 ff.

48 'Opinion of the Council's legal service' (n 1), n. 9.

49 Cf. *supra*, n 39 and accompanying text.

50 Cf. Drygala (n 1), 493, and Omlor (n 1), 1138. In fact, such a broad interpretation of Art. 50 TFEU, even if not uncommon (see Vossestein (n 8), 154 ff.), would be difficult to reconcile with AG Stix-Hackl's idea that the coordination requirement creates a restriction as regards the creation of forms of companies (cf. *supra*, n 41).

Art. 50(2) TFEU.[51] However, it must be conceded that it is not sure that the former provision could be read to completely disregard the content of latter (with particular regard to Art. 50(2)(g) TFEU), since it has been argued that the two paragraphs of Art. 50 TFEU are simply two facets of the same legal basis.[52]

The foregoing discussion suggests that Art. 50(2)(f) TFEU is, at best, a problematic legal basis on which to base the SUP Draft Directive or, at worst, an inappropriate one. Unfortunately, it is difficult to find a valid alternative. Obviously, Art. 352 TFEU would offer a more solid foundation on which to build the SUP. Using it as the SUP Proposal's legal basis would also allow further development of rules governing SUPs as well as ensure greater coherence with existing company law EU *acquis* under both harmonisation directives and supranational legal forms. But, choosing Art. 352 TFEU would force the Commission to seek unanimous approval from the Council. However, considering the Commission's success in obtaining such approval for the SE and the SCE, as well as the lessons it learned from its ill-fated SPE Proposal, convincing the Council to give such unanimous approval is still an eminently achievable goal.[53]

In truth, what really seems to be at stake, more than the recognition of Art. 50(2)(f) TFEU as a legitimate legal basis for the SUP, which is questionable, or the transnational or domestic nature of the SUP, which is not particularly decisive, is the definitive acknowledgement that Art. 50 TFEU could be used by European institutions as they see fit[54] to design – with a previously unknown degree of freedom – national company law.[55] This could, among other things, (a) result in the final abandonment of the harmonisation – that is, coordination – strategy of European company law, (b) lead to the adoption of measures that are not intended to actually approximate national laws, and (c) require reconsidering the reasons that justify the legal basis of the SE and the SCE and, more generally, the correct scope and limits of Art. 352 TFEU as a legal basis for European company law.

2. *The uneasy relationship with the EU* acquis

a). The explicit deviations from the EU acquis

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51 For a detailed analysis of this point, see 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 -', in the current issue of this review, --.

52 See, e.g., Forsthoff, 'Art. 50', in Grabitz - Hilf - Nettesheim eds., *Das Recht der Europäischen Union* (2014) 54. Ergänzungslieferung, Rn. 4; Müller-Graff, 'Art. 50', in Streinz ed., *EUV/AEUV* (2012) 2. Aufl., Rn. 10, who argue that Art. 50(2) TFEU is not a different legal basis from Art. 50(1) TFEU. This interpretation would also be coherent with the conclusions of Advocate General Stix-Hackl in Opinion on Case C-436/03 (n 16). For a more liberal approach see Vossestein (n 8), 87.

53 For this perspective, see Harbarth, 'From SPE to SMC – The German Political Debate on the Reform of the "Small Company"', in the current issue of this review, --, who argues that the adoption of a statute for the SPE would be preferable to the enactment of a directive addressed to single-member companies and gives suggestions on how a political consensus could be achieved to solve the issues that proved problematic during the discussions on the SPE Proposal.

54 Vossestein (n 8), 90 f., opines that the limit to the scope of Art. 50(1) TFEU as a valid legal basis is limited to the attainment of the freedom of establishment. Yet, as Grundmann - Glasow (n 8), 56 f., argue with regard to art 50(2)(g) TFEU, with an argument that could also easily be extended to Art. 50(1) TFEU, the harmonisation of EU company law, since the enactment of Dir. 68/151/EEC, also concerned measures that were not related to the attainment of this freedom.

55 See, in particular, Vossestein (n 8), 154 ff.

The SUP Draft Directive raises important issues as to its relationship with existing EU *acquis* on company law. One example arises in connection with the proposed rules on the representative powers of directors and authorised agents (Art. 24 of the SUP Draft Directive), which, at least for SUPs, effectively repeal the EU *acquis* of Dir. 2009/101/EC. Hence, the alleged restrictions of the freedom of establishment that should be abolished are nothing but the legitimate offspring of Art. 10 Dir. 2009/101/EC, which, when it was first adopted in 1968,[56] was considered an important achievement of EC law.[57]

Such a repeal, even if only partial, would result in the dishonorable demise of an important provision of EU company law, whose faithful implementation by the Member States has never been challenged by the Commission. In addition, the new SUP rules will not be adopted to further advance coordination or making equivalent the safeguards for the protection of the interests of members and third parties, but because the provision was, in the end, discovered to be an intolerable restriction on the freedom of establishment.

These observations also raise the more general question of whether the legal basis proposed by the Commission would allow such repeal. For example, it has been argued that for those aspects of the national laws to which Reg. (EC) 2157/2001 makes reference, a presumption of equivalence exists, which would not make obvious the need for harmonisation of these aspects of national law in view of the attainment of the freedom of establishment.[58] If this is true, it is also difficult to believe that obvious restrictions of the freedom of establishment exist in company law areas that have already been coordinated in view of the attainment of this freedom.

b). The relationship between the SUP Draft Directive and the harmonisation directives

Examining the relationship between the SUP Initiative and the existing European company law framework, the articles of the SUP Draft Directive that openly deviate from EU *acquis* are probably easier to evaluate; for those provisions, at least, the Commission's intentions are clear. In contrast, it is more difficult to understand if the existing EU *acquis* on company law, with particular regard to harmonisation directives, will apply to SUPs. From this perspective, it is worth noting that Dir. 2009/102/EC imposes harmonisation of the rules governing single-member private limited liability companies on Member States, specifically mentioning the national legal

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56 See Art. 9 Dir. 68/151/EEC.

57 Among the first, generally positive, comments following the enactment of Dir. 68/151/EEC, see, e.g., Ault, 'Harmonization of Company Law in the European Economic Community', 20 Hastings L. J. (1968), 77; van Ommeslaghe, 'La première directive du Conseil du 9 mars 1968, en matière de sociétés', Cah. dr. eur. (1969), 495 and 619; Stein, *Harmonization of European Company Law* (1971), 195 ff.; La Villa, 'The Validity of Company Undertakings and the Limits of the E.E.C. Harmonization', in 3 Anglo-Am. L. Rev. (1974), 346. With regard to the first dissenting voices, the only member of the European Parliament to cast a negative vote on the proposal deserves special mention: he famously defined this provision a "beast with a Latin head and a German body and tail" (reported by Stein (n 57), 296).

58 See Vossestein (n 8), 107, citing and concurring with Timmermans.

forms to which it is addressed.[59] In fact, the Annex to the SUP Draft Directive, makes reference to virtually the same list of companies.[60]

However, Dir. 2009/102/EC is not the only piece of European legislation that is applicable to single-member private limited liability companies: principally, reference should be made to Dir. 2009/101/EC on the coordination of safeguards for the protection of the interests of members and third parties and to Dir. 2013/34/EU on the annual and consolidated financial statements.[61] In addition, other directives, such as Dir. 2005/56/EC on cross-border mergers and Dir. 89/666/EEC on the disclosure requirements in respect of branches opened in other Member States, currently address single-member private limited liability companies.[62]

Yet, according to the SUP Draft Directive, none of these directives makes – and it is not anticipated that they will be modified to make – explicit reference to SUPs, which Member States may choose to incorporate in their national law as a new and distinct legal form from their existing private limited liability companies.[63] An important difficulty left open in the SUP Draft Directive is that of determining whether the EU *acquis* on private limited liability companies necessarily extends to such entities.

As it does not appear that the existing company law directives will be amended to mention SUPs, a literal interpretation of the Commission's initial SUP Proposal would allow Member States to decide to exempt SUPs from many rules currently applicable to single-member limited liability companies. For example, Member States could interpret the SUP Draft Directive, if adopted in its initial form, to give them the freedom to adopt completely different rules relating to the preparation and disclosure of financial statements or to modify the principles governing the nullity of companies. Unfortunately, this possibility jeopardizes the very uniformity already achieved in European company law. For the moment,[64] then, suffice it to say that, as formulated by the Commission, the SUP Draft Directive poses significant risks to the subjective scope of the

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59 In reality, Art. 6 Dir. 2009/102/EC extends, somewhat, the scope of that directive to public limited liability companies by imposing on those Member States that also allow these companies to become single-member companies to apply the same rules provided in that directive.

60 In principle, the SUP Draft Directive does not make a direct reference to public limited liability companies: the wording of its Art. 1(3) mentions "other companies than those listed in Annex I." However, the SUP Explanatory Memorandum (n 1), 6, makes clear that such reference should be understood to address "public" limited liability companies, too.

61 Malberti (n 1), 854.

62 A more delicate issue relates to the legal technique used to define the scope of both Dir. 2005/56/EC on cross-border mergers and Dir. 89/666/EEC on the disclosure requirements in respect of branches opened in other Member States. Both of those directives make reference to Dir. 68/151/EEC. As the proposed SUP could be a new legal form that will be, according to the Commission, clearly distinct from other private limited liability companies, it cannot be included within the scope of the first company law directive or these other two directives. Dir. 2005/56/EC might apply to SUPs by virtue of the SUP Draft Directive's Art. 2(1)(b), which extends the scope of the directive to the companies "with share capital and having legal personality, possessing separate assets which alone serve to cover its debts". Yet, some doubt as to the appropriateness of any such extension may still arise because it also requires that such companies, under national law, are subject "to conditions concerning guarantees such as are provided for by Directive 68/151/EEC." Certainly, some provisions of Dir. 68/151/EEC (now Dir. 2009/101/EC), by definition, cannot apply to SUPs (cf, e.g., Art. 10 Dir. 2009/101/EC and Art. 24 of the SUP Draft Directive). Thus, any such extension could not be considered justified.

63 Cf. *supra,* n 21.

64 See *infra*, III.

harmonisation directives and could even result in increased uncertainty within the legal framework governing single-member private limited liability companies.

3. Toward harmonising the legal framework governing groups of companies?

The SUP Draft Directive raises yet another question because it may introduce new regulation of groups of companies. While it is unnecessary to repeat the history of the debate on the harmonisation of group regulation,[65] it is worth recalling that Art. 2(2) of Directive 2009/101/EC currently provides that:

> Member States may, pending coordination of national laws relating to groups, lay down special provisions or penalties for cases where: (a) a natural person is the sole member of several companies; or (b) a single-member company or any other legal person is the sole member of a company.[66]

Interestingly, a similar provision is not included in the SUP Draft Directive; on the contrary, it emphasizes the fact that SUPs can be used to structure groups.[67] In other words, the SUP Draft Directive, if approved in its initial form, will become the first substantial piece of European legislation to directly address the rules governing groups of companies.[68]

This result is not surprising and, to some extent, it derives directly from the work that preceded the SUP Initiative, which focused its attention on, among other things, solving the problems faced by groups of companies. The Commission's choice of legal basis for the SUP Draft Directive (Art. 50(2)(f) TFEU) further supports such an interpretation, as that provision refers to abolishing restrictions on the freedom of establishment of subsidiaries in other Member States.

The Commission's approach, however, raises several questions. For example, it appears that the Commission's decision to abandon the wording of Art. 2(2) Dir. 2009/102/EC was not taken until after the first working draft thereof was prepared, but subsequent revisions did not specifically address the reasons for or the many implications of the decision to delete said wording.[69]

An obvious criticism of the Commission's choice of language (or lack thereof, as the case may be) in the SUP Draft Directive is that it introduces an embryonic regulation of European groups of companies without really addressing the key problems related to it. Interestingly, before the

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65 For additional information on initiatives concerning harmonisation of the legal framework on groups of companies, see Edwards (n 7), 390 f.; Grundmann - Glasow (n 8), 754 ff.; Bauer - Weller (n 1), 18 ff.; Teichmann (n 51), --.

66 In addition, Recital 5 of the quoted directive refers to the pending coordination of national laws concerning groups of companies.

67 Recital 23 of the SUP Draft Directive states: "[i]n order to facilitate the operation of groups of companies, instructions issued by the single-member to the management body should be binding". The right to give instructions has been considered as one key and useful innovation of the SUP Proposal, see Conac (n 13), --.

68 Teichmann (n 51), --, suggests that the SUP Proposal could introduce a set of enabling provisions for managing cross-border groups.

69 In principle, working drafts of Commission proposals are not typically made available. However, a document that can reasonably be considered a working draft of the SUP Draft Directive is available at http://www.linklaters.de/fileadmin/redaktion/Gesellschaftsrecht_M_A/Gesetzesmaterialien/EinpersonenGesellschaft_SUP/Einpersonengesellschaft.pdf (last visited May 11, 2014). Art. 3 of this early working draft closely follows the wording of Art. 2(2) Dir. 2009/102/EC.

SUP Draft Directive was officially published, the Commission explored the possibility of regulating "group interests" and group structure disclosure obligations, two topics on which the respondents to the consultations of the Commission showed interest. However, the final SUP Draft Directive does not incorporate any substantive provisions on these points.[70]

Perhaps, the SUP Draft Directive can be understood as being only a first step toward regulating groups of companies.[71] However, unless it is revised before it is finally adopted, the SUP Draft Directive will not provide any solutions to the various problems faced by groups of companies.

4. The template articles of association

An interesting aspect of the SUP Proposal is the possibility of creating such new legal entities by using template articles of association and registration forms. The SUP Draft Directive specifies, however, that such template articles of association can be modified by the single member.

The Commission's approach is not new and it is already practiced in many jurisdictions. Yet, giving the template articles of association and registration forms a European dimension could raise new challenges. More precisely, given that an SUP will be a domestic entity governed in large part by the national law of the Member State in which it is formed, it will be difficult to draft such a template set of articles of association that will fit all national legislation.[72] Moreover, given the existing differences in national law, it is difficult to find one-size-fits-all solutions that will work for all Member States for a variety of different issues.[73]

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70 The problems raised by implications for regulation of groups have been examined in particular in German scholarship: see e.g. Hommelhoff (n 1), 1065 ff.; Teichmann (n 1), 3563 ff.; Teichmann - Fröhlich (n 1), 540 ff.

71 Conac, 'Director's Duties in Groups of Companies – Legalizing the Interest of the Group at the European Level' (2013) 10 ECFR, 194 ff., also published in Engsig Sørensen - Birkmose - Neville eds., *Boards of Directors in European Companies* (2013), 75, who suggests that a recommendation would be the most suitable instrument to move harmonisation of legislation governing group of companies forward.

72 From this perspective, experience with Italy's template articles of association is instructive: after the adoption of template articles of association for the recently-introduced Srls, the Italian legislature decided to partially modify the rules governing these entities, making the template obsolete. At the same time, the legislature decided that the template was mandatory, raising numerous questions about the possibility of creating Srls using the obsolete template. On these problems, see, e.g., Spolidoro, 'Una società a responsabilità limitata da tre soldi (o da un euro?)', Riv. soc. (2013), 1085, 1104 ff.

73 A practical example might better illustrate the issues to be resolved in such any attempt at implementation. In Germany, for example, the UG Musterprotokoll essentially provides that a director is exempt from the restrictions of § 181 of the Civil Code (author translation from original: "Der Geschäftsführer ist von den Beschränkungen des § 181 des Bürgerlichen Gesetzbuchs befreit"). § 181 BGB, a German Civil Code provision relating to contracting with oneself, stipulates that "[a]n agent may not, unless otherwise permitted, enter into a legal transaction in the name of the principal with himself in his own name or as an agent of a third party, unless the legal transaction consists solely in the performance of an obligation". German law permits a waiver of the restrictions set forth in § 181 BGB in the articles of association of private limited liability companies, which waiver has become so customary that it is now included in the UG Musterprotokoll. Italy, on the other hand, does not permit a waiver of this type in the articles of association (see Ventoruzzo, 'Commento sub art. 2475-*ter*' in Marchetti et al. eds, *Commentario alla riforma delle società. Società a responsabilità limitata* (2008) 599, at 660 ff.). Thus, in the absence of a waiver in the articles of association, a German single-member private limited liability company would not be allowed to conclude contracts within the scope of § 181 BGB on the basis of the single shareholder's decision (for some reflections on this principle, see Zöllner - Noack, '§ 35', in Baumbach - Hueck eds., *GmbHG* (2013) 20. Aufl., Rn. 140; Stephan - Tieves, '§ 37', in Fleischer - Goette (herausgegeben von), *Münchener Kommentar zum GmbHG* (2012) 1. Aufl., Bd. 2, §§ 35-52, Rn. 185 ff.;

Even though the use of the SUP template articles of association would not be required, one can hardly imagine the trouble that would ensue if the applicable national law and the template's text have not first been properly coordinated. In addition, the problem should be considered from a dynamic perspective, taking into account possible developments in national law.

Finally, another important aspect of such a template relates to the manner in which the Commission expects it to be implemented. To ensure uniformity, the implementing act would have to be a regulation. But, if that were the case, such a regulation would preempt national company law, which would, in turn, exacerbate existing coordination problems. In that case, to comply with the SUP Draft Directive while simultaneously avoiding conflicts with any national law, the template articles of association would have to be extremely succinct,[74] which would probably result in a template that is not particularly detailed or specific about the rules governing the SUP, leaving many gaps that will have to be filled by default rules or by implied terms.[75]

5. The supervisory board of SUPs

The SUP Draft Directive raises yet another issue regarding the internal structure of SUPs: the provisions of the SUP Proposal appear to be more coherent with a one-tier board structure. Nevertheless, in Art. 22(3), it is said that

> [t]he management body may exercise all the powers of the SUP that are not exercised by the single member or, where applicable, by the supervisory board.

The exact implications of that reference to a supervisory board – where applicable – are difficult to predict. Certainly, the Commission's proposed SUP has many traits in common with existing private limited liability companies (much more so than with public limited liability companies) and many Member States simply do not allow private limited liability companies to adopt a two-tier board structure so the circumstances under which a supervisory board would be applicable remain unclear.[76]

However, Art. 22(3)'s inconsistency with existing national law is not the biggest concern the provision raises; Member States probably have the right to choose to adopt or reject a two-tier model of corporate governance for their private limited liability companies and, in all likelihood, would have the same right to choose with respect to SUPs.[77] Yet, even suggesting that Member States can adopt a two-tier board structure for their SUPs decreases the level of uniformity of SUP rules across jurisdictions. Moreover, as any rules that would relate to any such supervisory

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Altmeppen, '§ 35', *Gesetz betreffend die Gesellschaften mit beschränkter Haftung (GmbHG)* (2012) 7. Aufl, Rn. 84 ff.). Thus, if the uniform template fails to include such a waiver, German SUPs will not likely be allowed to engage in such transactions, making the SUP a potential trap for the unwary. If, on the contrary, that same uniform template includes such a waiver, the articles of association adopted in conformity with this solution will conflict with an established principle of Italian law, which prohibits such waivers.

74 Existing articles of association templates available in different Member States follow different approaches. Some, like the UK Companies (Model Articles) Regulations 2008, provide a detailed set of rules; others, like the UG Musterprotokoll, are more succinct. The Italian and the French model articles of association are concise, while the Spanish model is more explanatory, even if not as detailed as the UK Model Articles.

75 And, therefore, not particularly useful, cf., e.g., Neville - Sørensen (n 1), 568 ff.

76 For some few remarks on the role of the supervisory board in SUPs, see Beurskens (n 1) 743; Jung (n 1), 590; and Lecourt (n 1), 706.

77 See Lecourt (n 1), 706.

board would be entirely national, important SUP organizational aspects, such as the powers and the duties of the supervisory board, will remain entirely outside the scope of European company law.[78]

6. The solutions to the unsolved problems of the SPE provided by the SUP Draft Directive

As noted above, the Commission abandoned its SPE Proposal due to political deadlock over three different aspects of the proposed legal form: (a) its minimum capital requirements, (b) its ability to separate its registered office from its central administration, and (c) the participation of the employees.[79] The SUP Draft Directive adopts the same formula as used in the SPE Proposal with respect to two of those issues – that is, for the minimum capital requirement and the possibility of separating the registered office from the central administration – while the problem of the participation of the employees is not addressed.

a). Minimum capital requirements

aa). The reduction of minimum capital requirements

With regard to the minimum capital requirement, it is not necessary to reiterate the debate over the various strategies used to protect creditor interests, the different arguments in favor of the legal capital versus the solvency tests, or other alternative strategies.[80] Rather, suffice it to say that, just as it did for the SPE,[81] the Commission chose to set the SUP's minimal capital requirement at one euro (Art. 16(1) of the SUP Draft Directive).[82] This approach is in line with

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78 That limitations on the director's representative powers may derive from a resolution of the supervisory board poses yet another difficulty. SUP Draft Directive Art. 24 states that "[a]ny other limitation of the powers of the directors, by the articles of association, by a decision of the single-member or by a decision of the management body, may not be relied upon in any dispute with third parties, even if that limitation has been disclosed". This formulation does not take into account limitations arising from a supervisory board resolution, which may well be, for limited liability companies, included within the scope of Art. 10(2) Dir. 2009/101/EC, a situation that, in contrast, was expressly contemplated by Art. 33(2) of the SPE Proposal.

79 The difficulties faced by the SPE Proposal were also mentioned in the 'Commission Staff Working Document Impact assessment accompanying the document Proposal for a directive of the European Parliament and of the Council on single-member private limited liability companies', SWD(2014) 124 final, Brussels 9 April 2014, 19, n 61 (hereafter the 'Impact Assessment') and accompanying text.

80 It is virtually impossible to provide a detailed description of all the positions taken in this debate. Rather, for some of the most influential contributions see: Lutter ed., *Legal Capital in Europe* (2006); Hirt, 'The Wrongful Trading Remedy in UK Law: Classification, Application and Practical Significance', 1 ECFR (2004), 71; Miola, 'Legal Capital and Limited Liability Companies: the European Perspective', 2 ECFR (2005), 413; Ferran, 'The Place for Creditor Protection on the Agenda for Modernisation of Company Law in the European Union', in 3 ECFR (2006), 178; and the contributions in 15 EBLR (2004), 1029; and in 7 EBOR (2006), 1. Further details on the debate regarding the minimum may also be found in Hansen 'The SUP proposal – Registration and Capital (Articles 13 – 17)' in the current issue of this review, --.

81 On strategies to ensure creditor protection in the SPE Proposal, see Schutte-Veenstra - Verbrugh, 'The European Private Company and Capital Protection' in Hirte - Teichmann eds., *The European Private Company - Societas Privata Europaea (SPE)* (2013), 263; Hommelhoff - Teichmann, 'Societas Privata Europaea (SPE) – General Report', in Hirte - Teichmann eds., *The European Private Company - Societas Privata Europaea (SPE)* (2013), 17 ff.

82 Or, in the countries where the euro is not the national currency, to one unit of the national currency.

the trend in Member States, which picked up substantial momentum following *Centros*,[83] to lower the minimum capital requirements for their private limited liability companies.[84]

With respect to minimum capital, two things should be noted. First, this aspect of the SPE Proposal was probably not the decisive problem that led to the deadlock in the negotiations, but it was, instead, only one controversial issue discussed by the Council.[85] Moreover, rather than attempt to accommodate the position of those Member States that still believe a minimum capital requirement to be important, the Commission chose to rely on a different legal basis for its SUP Initiative, so that such Member States could not derail the SUP Initiative.

Second, as Advocate General La Pergola famously said in his opinion in *Centros*, "in the absence of harmonisation, competition among rules must be allowed free play in corporate matters".[86] In this sense, the fact that many Member States have modified their national law to decrease minimum capital requirements in the wake of that decision can be understood, at least, as a race toward uniformity rather than a deliberate determination by Member States that a minimum capital of one euro was preferable. The Commission's choice to harmonise the minimum capital requirement for SUPs along the same lines as the recent national law trend is less a reflection of harmonisation of company law and is more a reflection of its recognition of the results of the competition among national rules contemplated by AG La Pergola.

ab). The introduction of the solvency test

Another interesting aspect of the SUP Draft Directive, which is directly related to the SUP's minimum capital requirement, is the Commission's choice to incorporate a solvency test for any distributions.[87] Although this test in not exactly the same as that proposed in its SPE Proposal, it follows a similar path.[88]

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83 ECJ, 9 March 1999, Case C-212/97, *Centros Ltd v Erhvervs-og Selskabsstyrelsen* [1999] ECR I-1484.

84 On the reduction of the minimum capital requirement, see Conac (n 13), --. Although this trend followed *Centros*, it would be inaccurate to conclude that it was driven solely by the Court's recognition of the breadth of companies' freedom of establishment. Another possible driver that cannot be underestimated is the importance of international rankings, such as the "Doing Business" ranking, which considers high minimum paid-in capital requirements as a negative element in connection with "Starting a Business." From this perspective, it is interesting to note that at least some of the Member States that have reduced minimum capital requirements imposed stricter rules on required reserves and, thus, did not abandon their general approach to capital and reserves. For some interesting remarks on the evolving role of the legal capital in Europe, see Portale, 'Società a responsabilità limitata senza capitale sociale e imprenditore individuale con « capitale destinato » (Capitale sociale *quo vadis*?)', Riv. soc. (2010), 1237.

85 In addition, as Hansen (n 80), --, correctly highlights, in light the recent evolutions of the national laws of the Member States on this point, this feature of the SUP Proposal is probably "no longer the provocation that the similar tuned SPE proposal was deemed to be".

86 AG Opinion on Case C-212/97 (n 45), n. 20.

87 A detailed analysis of the rules of the SUP Proposal devoted to distributions may be found in Knapp, 'Directive on single–member private limited liability companies: distributions', in the current issue of this review. For more on this aspect of the SUP Proposal, see also Conac (n 13), --.

88 Cf, in particular, Art. 21 of the SPE Proposal. See also Hommelhoff - Teichmann (n 81), 18 ff.; Schutte-Veenstra - Verbrugh (n 81), 276 ff., who also underscores that the SPE proposal, in reality, did not necessarily require the introduction of the solvency test. However, it must be acknowledged that the SUP Proposal is only addressed to single-member companies, thus, it could be argued that in such companies, creditors, and third party protection could have specific features. Yet, it is difficult to say that, in connection with the SUP Draft

Nevertheless, the inclusion of such a test partially contradicts the conclusions of the DG Internal Market and Services: when it reviewed Dir. 77/91/EEC, it found no real evidence existed to suggest the superiority of the solvency test over a minimum capital requirement.[89] At least with respect to SUPs, it seems that the Commission may have reversed its position, as the documents accompanying the SUP Proposal state that, by establishing a minimum capital of one euro while simultaneously introducing a solvency test, "[t]he objectives could be fully achieved, . . . guaranteeing at the same time the adequate creditors' protection",[90] while suggesting that the use of a higher minimum capital requirement does not achieve the same result as "[c]reditors are only partially protected . . . , since capital turned into assets does not guarantee the liquidity, which is important for creditors".[91] Finally, while the Commission acknowledges that, in the absence of a minimum capital requirement, the interests of creditors could be put at risk, it concludes that the best strategy to address such risks would be to introduce a solvency test.

b). The applicable law

The SUP Draft Directive allows SUPs to separate their registered office from their central administration or principal place of business. There is, of course, no need to rehash the debate on the freedom of establishment of companies. However it is important to recall that the EU *acquis* on SEs and SCEs requires both the registered office and central administration of such entities to be located in the same Member State, which approach has proved viable for them, but which the Commission apparently does not consider appropriate for SUPs.[92] In addition, even recently, the European Parliament, in the context of its discussions on the now-abandoned European Foundation, supported the notion that the registered office and central administration of such entities should be located in the same Member State.[93]

Directive, the mandatory introduction of a solvency test will necessarily result in more effective creditor protection or that this new strategy may be considered expressly designed to protect the interests of creditors or third parties of single-member companies.

89 'Results of the external study on the feasibility of an alternative to the Capital Maintenance Regime of the Second Company Law Directive and the impact of the adoption of IFRS on profit distribution' available at http://ec.europa.eu/internal_market/company/capital/index_en.htm (last visited May 11, 2014), 2, where it is said that "[i]n the light of the conclusions of the external study, the view of DG Internal Market and Services is that the current capital maintenance regime under the Second Company Law Directive does not seem to cause significant operational problems for companies. Therefore no follow-up measures or changes to the Second Company law Directive are foreseen in the immediate future". For the external study mentioned by the Commission, see KPMG, 'Feasibility study on an alternative to the capital maintenance regime established by the Second Company Law Directive 77/91/EEC of 13 December 1976 and an examination of the impact on profit distribution of the new EU accounting regime', January 2008, available at http://ec.europa.eu/internal_market/company/capital/index_en.htm (last visited May 11, 2014).

90 Impact Assessment (n 79), 38.

91 Impact Assessment (n 79), 37 f.

92 In fact, the SUP Explanatory Memorandum (n 1), 3, suggests that "[t]o enable businesses to reap the full benefits of the internal market, Member States should not require that an SUP's registered office and its central administration be necessarily located in the same Member State".

93 'European Parliament resolution of 2 July 2013 on the proposal for a Council regulation on the Statute for a European Foundation (FE)' (COM(2012)0035 – 2012/0022(APP)).

Rather than address such issues piecemeal via the SUP Initiative and other EU-level initiatives, the time has probably come to address the "applicable law" for both national and European legal entities in a more systematic way, as was suggested some years ago by the Stockholm programme. In fact, among the many measures discussed in the context of that programme, mention was made of possibly adopting, in 2014, a "Green paper on private international law, including applicable law, relating to companies, associations and other legal persons."[94] Certainly, implementing such a global strategy would provide a more general and coherent solution to problems that have long been debated without resolution, and which deserve an adequate, certain, and definitive solution.[95]

Finally it should also be acknowledged that the Italian presidency of the Council suggested taking inspiration from the experience acquired with the *acquis* of the SE and the SCE to address this issue and proposed a different approach from that of the Commission. More precisely, the proposed approach, which is, in part, different from that adopted for the SE and SCE, would simply allow the Member State of registration to require that the registered office and head office of an SUP are located in its territory.[96] This strategy, surely, has the advantage of being more coherent with existing European company law, even if, just as surely, it does not provide a general solution to the broader problem of the determination of the applicable law to both national and European legal entities.

7. Some old and new problems left unaddressed in the SUP Draft Directive

Although the Commission has explicitly addressed several issues in its proposed SUP Proposal, it still leaves many questions unanswered. Even a cursory review of the SUP Draft Directive reveals three unresolved issues: (a) the consequences of the SUP Initiative on personal identification and anti-money laundering policies mandated by both the Member States and the European Union, (b) the possible transfer of an SUP's registered office to another Member State, and (c) employee participation.

a). Identification and anti-money laundering

The SUP Draft Directive, if adopted in its current form, would require Member States to allow the registration procedure "for newly incorporated SUPs [to] be completed electronically in its entirety" (Art. 14(3)), which may make SUPs less transparent than currently-existing single-member private limited liability companies,[97] since such electronic registration would,

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94 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 20 April 2010 – Delivering an area of freedom, security and justice for Europe's citizens – Action Plan Implementing the Stockholm Programme' COM(2010) 171 final, Brussels, 20 April 2010, 25.

95 On the potential role of the Stockholm programme in company law, see, e.g., Geens, 'The Stockholm Promise', 7 ECL (2010), 182.

96 See Art. 10 of the Proposal for a compromise presented by the Italian presidency of the Council and the 'Note to the proposal for a directive of the European Parliament and of the Council on single-member private limited liability companies' (n 1), II.D.

97 Guidotti (n 1), 106.

necessarily, result in a documentary procedure without the ability to verify that the identification documents actually correspond to the person incorporating the SUP.[98]

Although the issue is acknowledged in the impact assessment, it appears that the Commission does not believe it is necessary to avoid potential abusive use of SUPs at any cost:

> The risk of the misuse of direct on-line registration procedure for fraudulent aims potentially exists, but it must be offset against the benefits of the creation of companies and positive economic and social impacts connected with the increase of entrepreneurship in the EU.[99]

Thus, the Commission, in the context of its SUP Initiative, makes clear that, if a choice must be made between a potential increase in entrepreneurship and the potential for abuses, the former should prevail.

aa). The identification of the founder

With respect to concerns regarding the verification of the electronic information provided in an SUP's on-line registration, the Proposal for a compromise presented by the Italian presidency of the Council makes an explicit reference to Reg. 910/2014, which provides a European framework on the rules governing electronic identification and trust services for electronic transactions.[100] However, as has been correctly noted, that Regulation is not intended to be applicable to the information that should be filed in public registers.[101]

In addition, identification cannot be confused with certification of such identity by public authorities of a Member State.[102] From this perspective, verification of the identity of the founder and the information filed with the register – and, more generally, a check on the conformity of the documents filed – is also important to the maintenance of the integrity of the registers, which, in turn, is essential to recognizing the strong legal value of the information filed in these registers.[103]

Finally, it should also be noted that the framework provided by Reg. 910/2014 does not obligate Member States to accept and recognize foreign means of electronic identification in all

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98 Interestingly, problems concerning the lack of certification of the identification have also been raised in countries like Portugal (see Serra (n 1) 140, 143 and 150), where the on-line registration of companies seems possible (see Impact Assessment (n 79), 27).

99 Impact Assessment (n 79), 29.

100 See, in particular, Art. 13(1a) and 14b(1) of the Proposal for a compromise presented by the Italian presidency of the Council, and Note to the proposal for a directive of the European Parliament and of the Council on single-member private limited liability companies (n 1), II.A; cf. Conac (n 13), --; Lecourt (n 1), 702, who supports this approach.

101 See Teichmann - Fröhlich (n 1), 543; interestingly, the only reference to business registers in Reg. 910/2014, is made in Recital (21) to make clear that the regulation "should not affect national form requirements pertaining to public registers, in particular commercial and land registers".

102 Lucini (n 1), --.

103 See in particular Eickelberg (n 1), 85 f. arguing that the information in the business register can only be as good as the process that leads to its registration. From this perspective it is not surprising that Member States that do not impose strict controls, in spite of what appears to be a plain reading of Art. 2(6) Dir 2009/101/EC, do not recognize a positive value to the information that is published pursuant to that directive (see, e.g., Edwards (n 7), 30 f.; Hannigan, *Company Law* (2012), 142, n. 25.

circumstances.[104] That regulation simply seeks to improve the framework for cross-border recognition of electronic identification, without imposing on Member States a duty to adopt such identifications.[105] Hence, the goal pursued by the Commission with regard to cross-border on-line registration can hardly be achieved by relying heavily on this piece of legislation.[106]

ab). The performance of anti-money laundering controls and the identification of the beneficial owner

If the SUP Draft Directive is adopted as proposed by the Commission, the likely result in many Member States will be a loss of several protections mandated by Dir. 2005/60/EC on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing. More precisely, Art. 2(1)(3)(b)(v) of that directive applies to legal professionals who assist their clients in the context of the "creation, operation or management of trusts, companies or similar structures." Because the SUP Draft Directive, as proposed, allows an "entirely electronic" registration procedure, this safeguard, which mimics the recommendations of the FAFT, will be easy to circumvent.[107] Moreover, the SUP Draft Directive's approach is not particularly coherent with the Commission's own recently-proposed legislation on anti-money laundering, in which the Commission said that "[t]here is a need to identify any natural person who exercises ownership or control over a legal person."[108] Finally, in the absence of any verification of the identity of the person or persons who actually create an SUP, the integrity of any information concerning its beneficial ownership could be put in danger.

It may be suggested that, in order to solve this problem, a declaration by the person establishing the SUP identifying who is the beneficial owner could be sufficient or that the anti-money laundering controls could be performed by the bank in which the initial capital of the SUP is to be deposited. Another alternative would be to require identity verification be carried out by video transmission. Such solutions, however, raise some relevant problems: first, it is evident that a declaration submitted by the person that creates the SUP cannot be equated to verification of information performed by a third party and, in particular, to such verification performed by a public authority. Second, even if an anti-money laundering review performed by a bank could be considered as trustworthy as that performed by an authority or a professional, that review would concern only the specific transaction – that is, the particular deposit – and would not be a review of the creation and acquisition of legal personality by the SUP, which is a distinct type of

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104 Wuisman (n 1), 41.

105 Wuisman (n 1), 41 f.; see also 'Electronic identification, signatures and trust services: Questions & Answers' Brussels, 4 June 2012, available at http://europa.eu/rapid/press-release_MEMO-12-403_en.htm (last visited January 30, 2014); but cf. Lecourt (n 1), 702.

106 Cf. Wuisman (n 1), 41 f.

107 FAFT, 'International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation', Paris, February 2012, available at www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf (last visited May 11, 2014), 20.

108 Recital 10 of the 'Proposal for a directive of the European Parliament and of the Council on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing', COM(2013) 045 final, 2013/0025 (COD), Strasbourg, 5 February 2013.

verification mentioned by anti-money laundering legislation.[109] Moreover, apparently more promising is the possibility to conduct identifications and anti-money laundering checks via video transmission, as it seems that this possibility is already used, within a well-defined framework, in some Member States.[110] However, also this approach raises concerns, for example, like the potential impossibility of performing an actual authenticity inspection of the identification documents provided by the founders.[111]

b). Cross-border transfer of the registered office

The second problem not explicitly addressed in the SUP Draft Directive is the entities' cross-border mobility. Unlike the ill-fated SPE Proposal, the SUP Draft Directive does not make reference to any specific procedure for the cross-border transfer of an SUP's registered office.[112] In principle, such transactions would have to be governed by both the national law of the Member State in which an SUP currently has its registered office and that of the destination Member State. It would appear that the Commission deliberately chose not to address the issue in light of the fact that, in the context of the negotiations on the failed SPE Proposal, cross-border transfers were seen by some Member States as a threat to employee protections granted by national law.[113]

The approach adopted by the Commission certainly limits the potential for taking advantage of legal arbitrage. However, for some Member States, requiring a new criterion for determining the applicable law to an SUP – that is, that of the registered office – could open new possibilities for previously unknown cross-border transfers of seat and cross-border conversions.[114]

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[109] See Lecourt (n 1), 702, who – incorrectly – equates the verifications concerning the opening of a bank account to those concerning the creation of legal entities. And see cf Conac (n 13), --, who praises the approach adopted in the SUP Proposal that would require registration authorities to identify the beneficial owner. Yet, the Proposal for a compromise presented by the Italian presidency of the Council simply makes reference to the need for the possibility for Member States to require a simple "declaration by the person establishing the SUP identifying the beneficial owner of the SUP" (Art. 13(1)(da)).

[110] For example, this possibility was recently introduced in Germany and detailed in a circular issued by the BaFin (Rundschreiben 1/2014 (GW)).

[111] Among the different requirements that, in Germany, must be satisfied to conduct the identification process via video transmission, Rundschreiben 1/2014 (GW) specifies that only "identity documents featuring optical safety features which are equivalent to holographic images may be used as proof of identity within the scope of this process." Arguably, the idea behind this requirement is that only recourse to these security features may allow verification of the authenticity of the documents via video transmission. Unfortunately, not all Member States rely on holographic images for their national identity cards. Consequently, if authentication via video transmission is adopted, even those Member States – such as Germany – that already allow this identification procedure will most likely be required to accept, for the registration of SUPs, identification documents whose authenticity may be difficult to verify at distance.

[112] The reluctance of the Commission to address the problem of the transfer of the registered office is clearly expressed in Impact Assessment (n 79), 41.

[113] Id.

[114] For example, it is difficult to imagine the ultimate consequences of introducing the registered office principle in countries that do not recognise the possibility of a cross-border transfer of seat for domestic limited liability companies without a European nature and, instead, adopt the incorporation theory. Therefore, either the SUPs created in these countries will not be allowed to transfer their registered office abroad or such companies will be granted the right to abandon their nationality, a possibility that might not be available to domestic private limited liability companies. Further, according to Art 10 of the SUP Draft Directive, SUPs must have their

Thus, the mere fact that the SUP Draft Directive does not specifically address cross-border transfers of seat does not mean that it could not have consequences on this problem. Quite the contrary, imposing the registered office criterion for determining the applicable law for SUPs may open new avenues for cross-border mobility. But, as the rules that will govern these transactions will not be harmonised, the legal framework in which they can and will take place will remain disorganized.

c). Employee participation

Finally, the third issue left unaddressed in the SUP Draft Directive is employee participation in the management of the SUP: there is a complete absence of any provision related to this problem. The Commission's approach is interesting in light of its position on the matter in the context of the failed SPE Proposal, where the issue resulted in the Council's deadlock and the Commission's ultimate withdrawal of the SPE Proposal.[115] Rather, the Commission only made one cursory remark relating to employee participation in the impact assessment:

> As the preferred options would not touch upon the question of the transfer of registered offices or employee participation, and these would remain covered by national laws, it would not be necessary to introduce measures to minimise the potential circumvention of applicable social and other rights, since anti-abuse measures, if necessary, are laid down by national law.[116]

The Commission emphasizes that national law will govern employee involvement in the SUP's governance. However, as mentioned in the context of the transfer of registered office,[117] it is evident that national rules on employee participation, while not formally modified by the SUP Draft Directive, will still be impacted by it. Rather, the SUP Draft Directive's reference to the SUP's registered office as the only criterion for establishing the national law applicable to the SUP will force greater flexibility under national law: for example, an SUP could be formed in a Member State that does not recognise any form of employee participation, and that SUP could, by virtue of its freedom of establishment, operate in other Member States, even if those other Member States impose an employee participation obligation on their own SUPs.

It is difficult, at present, to know whether and to what extent the SUP Draft Directive, if adopted in its current form, would result in increased abuse of the freedom of establishment. If looking at it solely from the perspective of using foreign SUPs to avoid employee participation obligations, for example, it is fairly obvious that similar results can already be achieved using the existing forms of single-member limited liability companies permitted by Member States' current national law.[118]

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registered office and either their central administration or their principal place of business in the EU, new arguments for invoking the ability of a cross-border transfer of seat might be advanced.

115 The difficulties faced by the SPE Proposal are also mentioned in the Impact Assessment (n 79), 19, n 61; cf. also Hommelhoff - Teichmann (n 81), 23 ff.

116 Impact Assessment (n 79), 41.

117 *Supra*, II.7.b).

118 Yet, the SUP Draft Directive, if adopted in its proposed form, grants an additional degree of freedom to single shareholders as it allows companies incorporated in Member States that use the real seat theory to operate abroad without losing their nationality. For example, it would allow to an SUP created in Luxembourg – which,

Cleary, if adopted as proposed by the Commission, the SUP Draft Directive will increase, and is intended to increase, cross-border creation of subsidiaries and such entities could well be used for both legitimate and fraudulent purposes. Perhaps, at least from this perspective, SUPs could arguably increase the risk that companies will avoid national laws concerning employee participation, and it is difficult to say if the costs deriving from these risks will outweigh the benefits generated by the SUP.

Moreover, it is worth noting that, after the SUP Proposal's publication, trade unions expressed, among other things, concerns about the possibility that companies that are subject to national employees participation laws could decide to register subsidiaries in other Member States where such rules do not exist.[119] These criticisms were also voiced in the Opinion of the EESC[120] and are currently discussed by the Committee on Employment and Social Affairs of the European Parliament.[121] Thus, it appears, that employee participation will remain a controversial aspect of the SUP Proposal, even if the SUP Proposal does not directly address the topic.

In this context, the fact that the Proposal for a compromise presented by the Italian presidency of the Council suggests taking, somehow, inspiration from the experience with the *acquis* of the SE and the SCE for the determination of the applicable law may also be understood in light of the need to introduce some limits to potential abuses of the freedom of establishment.

III. The compatibility of the SUP Proposal with the substance and goals of the existing European company law framework

1. The SUP Proposal: somewhere between coordination and negative harmonisation

It is important to examine how the SUP Draft Directive, if adopted as proposed by the Commission, can be coordinated with the existing harmonisation directives. The initial SUP Proposal reflects an entirely new strategy in its efforts to strengthen integration of the internal market, one that should be examined carefully. A move away from coordination and toward "negative harmonisation" with respect to single-member companies was first suggested by the Reflection Group when it recommended that any future directive addressing such entities

> should not only exempt single member companies from certain harmonised rules . . . , but in order to secure the basic needs of entrepreneurs, it would identify the rules that are indispensable for a single-member company.[122]

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in principle, applies the real seat doctrine – to operate abroad, preserving its nationality without maintaining its central administration in Luxembourg.

119 See ETUC 'Position on single-member private limited liability companies', 11-12 June 2014, available at http://www.etuc.org/documents/etuc-position-single-member-private-limited-liability-companies#.VNUXeixmLFk (last visited January 30, 2015).

120 See Opinion of the EESC (n 1), 1.6; 3.3, 4.4 and 4.4.

121 See Draft Opinion of the Committee on Employment and Social Affairs of the European Parliament, 12 March 2015, available at http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fNONSGML%2bCOMPARL%2bPE-549.466%2b01%2bDOC%2bPDF%2bV0%2f%2fen (last visited April 2, 2015), which recommends a rejection of the SUP Proposal.

122 'Report of the Reflection Group on the Future of EU Company Law', Brussels, 5 April 2011, Riv. soc. (2011), 911, also available at ec.europa.eu/internal_market/company/docs/modern/reflectiongroup_report_en.pdf (last visited May 10, 2014), 66.

From this perspective, the question of how the SUP Draft Directive is to be coordinated with the EU *acquis* becomes crucial, not only with respect to the practical implications of such coordination, but, more generally, to understand in what direction European company law is headed.

a). Toward negative harmonisation?

One way to examine the question is to assume that, in putting together the SUP Draft Directive, the Commission, taking up the Reflection Group's suggestion, incorporated all of the rules it believes are indispensable for single-member companies.[123] Accordingly, if a specific rule of an existing harmonisation directive is not incorporated into the SUP Draft Directive, that rule is not applicable to SUPs, as an extension of such rule's scope was not considered necessary.

Unfortunately, such an assumption (and the reasoning that would follow), is probably false because, to some extent, the SUP Draft Directive presented by the Commission relies on existing EU *acquis* without actually reproducing some provisions whose applicability is obviously assumed. For example, its Recital 14 states:

> In order to ensure a high level of transparency, all documents registered at the register of companies should be made publicly available via the system of interconnection of registers referred to in Article 4a(2) of Directive 2009/101/EC of the European Parliament and of the Council.

Similarly, the entire electronic registration procedure, which the SUP Draft Directive carefully regulates, clearly assumes the existence of such business registers, which registers, in turn, are arguably governed by national rules transposed from Dir. 2009/101/EC.

b). The SUP Draft Directive's coordination with the EU acquis *found in its silence*

Aside from those harmonisation directive rules reproduced in the SUP Draft Directive itself, those rules that clearly diverge from the existing EU *acquis*, and those rules whose application is clearly assumed by the SUP Draft Directive, a number of grey areas remain, where, to the considerable detriment of legal certainty, the absence of further guidance permits a plethora of potential interpretations. For example, the SUP Draft Directive makes reference to annual accounts (see, e.g., Arts. 18(2) and 21(2)); however, the SUP Draft Directive offers no additional details of the rules that apply to such documents or their preparation. Are Member States permitted to define for themselves what such annual accounts should include? Or, should existing EU *acquis* regarding such annual accounts apply?

In still other situations, important issues, such as the nullity of SUPs, are not even mentioned in the SUP Draft Directive. Are Member States required to limit the situations in which an SUP is to

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[123] However, the Report of the Reflection Group (n 122), 66, also suggests that "Member States would have to allow this simplified vehicle to be introduced in their legal system, thereby adopting the "Simplified Sarl/GmbH/BV", etc. Although the essential characteristics of this entity would be formulated at the European level, such regulatory approach would obviously not change the domestic nature of the company type". That clarification is important because it demonstrates that, from the perspective of the Reflection Group, these simplified single-member companies were to be considered as a simplified form of existing private limited liability companies, to which, arguably, the EU *acquis* would already have been applicable (cf. *supra*, n 21).

be considered null and void? Must such nullity be declared by a court? Does any declared nullity have retroactive effect? Does an invalid SUP ever acquire legal personality? Are Member States obliged to require that the formation of an SUP be subject to a preventive administrative or judicial review or that any instrument of incorporation be drawn up by a qualified person and certified to be in due legal form? Even a careful reading of the exact wording of the SUP Draft Directive leaves such questions unanswered, although, at least with regard to the final question, one might conclude that the SUP Draft Directive abandons the idea that prior administrative or judicial review of an SUP's incorporation is necessary, at least in those Member States where the preventive check is ensured by the authentic legal form of the incorporation instrument. Such an impression arguably arises from Art. 14(3), which states:

> Member States shall ensure that the registration procedure for newly incorporated SUPs may be completed electronically in its entirety *without it being necessary for the founding member to appear before any authority in the Member State* of registration (emphasis added).

The documents accompanying the SUP Draft Directive suggest that the Commission is aware of the differences that exist between a legal entity's instrument of incorporation and its registration.[124] In addition, it also seems that its drafters are well aware that, in many jurisdictions, registration is not carried out by the founder, but by the entity's directors or other intermediaries.[125] Yet, the SUP Draft Directive is silent as to the practical conclusions that could be drawn from the wording of Art. 14(3) vis-à-vis Art. 11 Dir. 2009/101/EC, namely the possible implicit abrogation of the last part of the latter provision where it makes reference to the fact that Member States may require that the instrument of incorporation be "drawn up and certified in due legal form".[126]

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[124] The SUP Draft Directive does not provide satisfactory rules relating to the instrument of incorporation, which appear to be confused with the legal entity's articles of association. Its Art. 2 defines the "articles of association" as "articles of association or statutes or any other rules or instruments of incorporation establishing a company". This definition may lead to further issues. For example, its Art. 7(4) goes on to say that "[t]he SUP, and its articles of association, shall be governed by the national law of the Member State where the SUP is registered." If one reads the two provisions together, it appears that until the company is registered, the law applicable to an SUP's instrument of incorporation is, arguably, unknowable (this problem is also raised by Wuisman (n 1), 43).

[125] For example, the Impact Assessment (n 79), 30, clearly acknowledges that registration need not be made by the SUP's founder. From this perspective, it is also surprising that the same Impact Assessment (n 79), 28, emphasizes that the SUP Draft Directive, if adopted as proposed, would "make it possible for EU founders (legal and natural persons) to establish a company in another MS directly from their computer without a need for travel to the MS of registration for the purpose of registering the company"; see also Lecourt (n 1), 702; Gongeta, (n 1), 840. This idea reflects a certain lack of awareness of how cross-border subsidiaries and companies are currently created – using "powers of attorney" – as these do not require the physical presence of the founder either (on this point see also Lucini (n 1), --). Interestingly, since the Proposal for a compromise presented by the Italian presidency of the Council suggests that the Member State of registration may require that the registered office and the head office of the SUP are located in its territory, it seems that at least the directors of an SUP could somehow be required by national law to be physically present in the Member State of registration. Obviously, if this will be the approach that is finally retained, it will become difficult to argue that the physical presence in the Member State of registration of a future director of the SUP – or of any person – acting on behalf of the founder, could be an unacceptable restriction on the freedom of establishment.

[126] It has been highlighted that there may not be an irresolvable contradiction between Art 14(3) and the current wording of Art. 11 Dir. 2009/101/EC (see e.g. Hansen (n 80), --, Conac (n 13), --); yet, in the SUP Proposal, the Commission does not provided any suggestion on how these two provisions could be reconciled.

In addition, given the wording of Art. 14(3), one could also argue that the use of a template could act as a substitute preventive check concerning the creation of the legal entity. However, since there will always be variable parts in the template, like the object clause and the name of the company, whose conformity with the law will have to be verified, and since these parts of the instrument of incorporation are normally those that deserve more careful preventive scrutiny, it might be difficult to agree with this conclusion.

In this intricate context, it is important to highlight that the problem of coordination with the *acquis* has been raised in the Proposal for a compromise presented by the Italian presidency of the Council, which states, in Recital 10a, that, in order to ensure consistency, the rules applicable to private limited liability companies in the Member State of registration of the SUP should apply to SUPs, including Directive 2009/101/EC and Directive 2013/34/EU. This reasonable addition, if maintained in the final text of the directive, reveals that the SUP directive should not be understood as a general repeal of the *acquis*, as that would allow Member States to introduce a new national legal form not subject to the existing harmonisation directives.

c). Extending the scope of harmonisation directives to new legal entities

Whether harmonisation directives should be extended to new legal entities is not a new question; European company law has already faced similar coordination issues in the past.[127] For example, new limited liability company forms have been introduced by Member States that were not – just as the SUP will not be – explicitly mentioned in existing harmonisation directives.[128] In other cases, coordination between Dir. 68/151/EEC and subsequent directives, such as Dir. 78/660/EEC, was complicated by the fact that some of the legal forms mentioned in the latter directives were not mentioned in the former.[129] Legal scholars debated a number of different ways to resolve such coordination problems.[130] In the past, the ECJ,[131] and, arguably, the Commission,[132] appeared to adopt a rather loose interpretation of the subjective scope of Dir.

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127 On such problems, see the seminal contributions of Mülbert - Nienhaus, 'Europäisches Gasllschaftsrecht und die Neubildung nationaler Gesllschaftsformen', 65 RabelsZ (2001), 513, 533 ff., and Tellis, 'Expansion of the Applicability of EU Company Law Directives via Analogy? – A Study Based on the Example of Greek Sea Trading Companies –', 5 ECFR (2008), 353.

128 For example, the French SAS or the Dutch BV, before the enactment of Dir. 2003/58/EC, were not mentioned in Dir. 68/151/EEC.

129 For example, Dir. 68/151/EEC did not mention the Dutch BV.

130 For the different positions, see Grundmann - Glasow (n 8), 149 f., in particular n 10 and 12. See also Mülbert - Nienhaus (n 127), 539 ff. and Tellis (n 127), 372 ff., both favorable to an extensive or an analogical interpretation of the EU *acquis*. It is also worth noting that, when European company law was first introduced, van Ommeslaghe (n 57), 522, argued that "[b]ien entendu, un Etat membre ne pourrait, à notre avis, sous couleur de créer des « sociétés spéciales », multiplier les régimes particuliers qui permettraient en fait d'échapper aux dispositions de la directive — et à celles des directive subséquentes en voie de préparation. En cas de doute, il conviendrait d'examiner la question cas par cas". However, see also Guyon, 'La société par actions simplifiée et le droit communautaire', in Couret - Le Cannu (sous la direction de) *Société par actions simplifiée*, Paris, 1994, 147 ff.; Id., 'Die Société par Actions Simplifiée (SAS) – eine neue Gesellschaftsform in Frankreich –', ZGR (1994), 551, 558 f., who opposes an extensive or analogical interpretation of the EU *acquis* to the French SAS.

131 ECJ, 20 September 1988, Case 136/87, *Ubbink Isolatie / Dak- en Wandtechniek* [1988] ECR 4665, n. 44; Grundmann - Glasow (n 8), 149 f.

132 Grundmann - Glasow (n 8), 149 f., in particular n 11.

68/151/EEC, by either implicitly or expressly including all forms of companies with limited liability within the scope of this legislation.

Such a flexible approach to interpreting the EU *acquis* was developed at a time when harmonisation by means of directives dominated European company law; currently, however, the appropriateness of such a legislative strategy has been brought into question.[133] Moreover, that Art. 1(2) of the SUP Draft Directive introduces a delegated procedure to modify its Annex I, which enumerates the types of companies governed by it, is more consistent with the notion that the subjective scope of the SUP Draft Directive should be interpreted narrowly rather than flexibly.[134]

The problem has also been recently examined by the ECJ in a case concerning tax law, which had to determine whether the French *Société par Actions Simplifiée* fell within the scope of Dir. 90/435/EEC. In that case, the Court concluded that a form of company not expressly listed in the annex of the directive did not fall within the scope of application of that directive[135], an approach that, arguably, cannot be excluded also for company law directives.[136]

Nevertheless, even after taking all these problems into account, it seems that bringing the SUP within the scope of existing harmonisation directives remains preferable. In brief, with the exception of those parts of the original SUP Draft Directive that clearly diverge from existing European law, it is not easy to conclude whether or not it is compatible with the existing EU *acquis*. Indeed, the simple fact that it does not modify Dir. 2009/101/EC supports the idea that the Commission did not clearly intend to exclude the application of the EU *acquis* to SUPs. An approach that is confirmed also by the Proposal for a compromise presented by the Italian presidency of the Council, which solves the problem by making an explicit reference to the application of harmonization directives.

2. The legacy of Dir. 68/151/EEC

The First Company Law Directive, Dir. 68/151/EEC, was adopted almost fifty years ago and its drafting began years before that. During that process, the drafters undertook an in-depth analysis of the existing national company law of all six founding Member States of the European

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133 For a critical assessment of the results achieved by harmonising European company law, see Enriques, 'EC Company Law Directives and Regulations: How Trivial Are They', 27 U. Pa. J. Int'l Econ. L. (2008), 1; and cf. Enriques 'Company Law Harmonisation Reconsidered: What Role for the EC?' in Bartman ed., *European Company Law in Accelerated Progress* (2006), 59 ff.; Cheffins, *Company Law: Theory, Structure, and Operation* (1997), 448.

134 In fact, a delegated procedure for amending the annexed list of the entities, to which the SUP Draft Directive would apply, would be particularly important if any doubts arise as to the ability to apply this piece of legislation to any new future limited liability company forms adopted by the Member States.

135 ECJ, 1 October 2009, C-247/08, *Gaz de France v. Berliner Investissement* [2009] ECR I-9225, n. 25 ff.; Opinion of the Advocate General Mazák, 25 June 2009, C-247/08, *Gaz de France v. Berliner Investissement* [2009] ECR I-9225, n. 27 ff. Boulogne - Geursen, '*Gaz De France*: Dividends to Companies Not Listed in the Parent-Subsidiary Directive are Not Exempt', 50 European Taxation (2010), 129; Hahn, 'Von kleinen Aktiengesellschaften, sociétés par actions simplifiées und anderen Raritäten – der Anwendungsbereich der Mutter-Tochter-Richtlinie nach „Gaz de France"', EWS (2010), 176.

136 Cf. Opinion of the Advocate General Trstenjak, 2 June 2010, C-81/09, *Idrima Tipou A.E. v. Ipourgos Tipou Kai Meson Mazikis Enimerosis* [2010] ECR I-10161, n 54, n. 34 and accompanying text.

Community. Although some have ultimately found the result unsatisfactory,[137] that first attempt at harmonisation demonstrated that, indeed, substantive harmonisation was possible and it still informs European company law today.

The goal of that directive was to make shareholder and third-party safeguards equivalent throughout the Community, by harmonising different aspects of European company law. Existing national law affecting such aspects was approximated by its focus on achieving certain objectives rather than forcing the same strategy on all jurisdictions to attain them.

In contrast, the Commission's SUP Proposal takes a different path, one that focuses on the manner in which its objectives – such as a standard minimum capital requirement, the need for a uniform template for the articles of association, and on-line registration – are to be achieved. Although this new approach will likely result in transpositions that are faithful to the letter of the SUP Draft Directive, whether or not its adoption will ultimately result in an approximation of the national company law of the Member States remains to be seen, but success in this regard already appears doubtful.

3. For a policy-based harmonisation of European company law

As previously noted, the SUP Draft Directive typically adopts text-based solutions to achieve its goals and avoids a direct confrontation with the policy choices underlying the SUP Initiative. Good examples of the Commission's non-confrontational strategy can be found in the SUP Draft Directive's failure to address employee participation and to establish any rules on the cross-border transfer of an SUP's seat. In the end, it is clear the Commission's SUP Proposal reflects its understanding of the various policy issues that ultimately forced it to abandon its SPE Proposal, but it then tries to accommodate or avoid those same issues with questionable results and, perhaps even more importantly, without openly disclosing their continuing existence in the context of its SUP Initiative.

From this perspective, and in light of the need for further integration of the internal market, the critical question that must be answered in the affirmative with respect to the SUP Proposal is: does the proposed text-based harmonisation enhance the integration of the internal market and increase legal certainty for single-member companies operating cross-border? If that question cannot be definitively answered in the affirmative, the SUP Draft Directive, as currently proposed, should be carefully revised. Moreover, the potential risks to enhanced integration and legal certainty arising from a heterogeneous implementation of the SUP Draft Directive as proposed should be carefully identified and considered prior to any such adoption.[138]

An alternative strategy that is far more likely to lead to an affirmative answer to the question posed above is to adopt a policy-based harmonisation, more along the lines that the First Company Law Directive adopted all those years ago. Allowing Member States to find, within certain limits and a carefully defined framework, their individual way along the path toward integration of European company law is not new and, frequently, EU directives give Member

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[137] See, for example, Cotiga (n 47), 97 ff.; Enriques, 'EC Company Law' (n 133), 11 and 22, argues that the scope of European directives and regulations is limited and does not cover core company law issues. Similarly, see Cheffins (n 133), 434, 448. However, it should be noted that, in the end, it is the harmonisation of laws in itself that tends to be fragmentary.

[138] Enriques, 'EC Company Law' (n 133), 12 ff.

States a significant degree of freedom in their implementation.[139] From this perspective, the clear and succinct policy goals stated in the preamble of Dir. 68/151/EEC, in combination with the different options it gave to Member States to achieve them, allowed the implementation of that directive to substantially strengthen integration of the common market.[140] If the SUP Proposal is modified to adopt the same or a similar policy-based approach, it is far more likely to become a successful piece of EU legislation and to demonstrate that an effective approximation of European company law by means of directives, even if not easy to achieve, is still possible.

IV. Conclusion

This article examined some key features of the Commission's SUP Proposal. As has been shown, the current form of the SUP Draft Directive displays some peculiarities that can only be understood in light of that debate and the history of EU company law, particularly the difficulties faced by the Commission's now-abandoned SPE Proposal. The Commission's choice to use a directive to introduce the SUP as a new national legal form was, in all likelihood, made in order to ease legislative passage of the SUP Draft Directive rather than assure harmonisation or approximation of national company law.

The unusual strategy – at least in the context of EU company law – to advance integration of the internal market brings some unexpected consequences that risk an increase in uncertainty in the legal context in which single-member companies will operate. More precisely, I note that a crucial issue left unaddressed by the SUP Draft Directive is that of its relationship to and coordination with the EU *acquis* on company law. Moreover, I suggested that the existing harmonisation directives should be applied to SUPs, even if the nature of SUP Draft Directive is different from any other existing European legislation on company law. From this perspective, I also argued that, to strengthen integration of the internal market, it would probably have been better to continue along the existing path of positive harmonisation of European company law.

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[139] Yet, in some cases, these options are the result of negotiations that may also threaten some of the initial goals of the proposed legislation. For example, see the interplay between Recitals 16 and 21 Dir. 2004/25/EC. For some interesting reflections on the role of optional rules in Dir. 2004/25/EC, see Enriques, 'EC Company Law' (n 133), 12 ff.

[140] Cf Hansen (n 80), --, arguing that "harmonisation should be used to enable choices and not to reduce the available plethora of options to a single standard", but proposing other conclusions.