

## MBB Advocacy Brief

***The Malta Business Bureau is the EU-Business advisory office of the Malta Chamber of Commerce, Enterprise and Industry, and the Malta Hotels and Restaurants Association.***

### 2014/0120(COD) – Proposal for a Directive on single-member private limited liability companies

There are currently 21 million SMEs in the EU, 5.2 million of which are single-member private limited liability companies. Despite the success of the internal market, obstacles in cross-border establishment still exist, hampering SMEs' full development. Divergent and complex national corporate rules, still prove a hindrance, resulting in only a small number of SMEs investing abroad.

Establishing companies as subsidiaries in other EU jurisdictions involves costly legal and administrative requirements. In 2008, the European Commission attempted to address this shortcoming in the Internal Market with the proposed European Private Company Statute (SPE). However, despite strong support from businesses, it was never able to take off due to lack of compromise among member states and was ultimately withdrawn.

The proposed Single-Member Private Limited Liability Company directive is essentially a repackaged proposal, which asks member states to provide for, in their national legislation, a national company law form, harmonized across the EU. The national company law form would be given a common name: *Societas Unius Personae* (SUP).

#### ***General Comments***

This proposal should be seen as a vehicle which will boost cross-border establishment and entrepreneurship in the European Union. While there are some risks associated with it, it does not offer any more risks than any other national company law form, particularly with the institutions advocating for the requirement of building of legal reserves, and doing away with the issue of the split-seat.

The MBB, on behalf of the Malta Chamber and MHRA, adopts a positive approach to this dossier. The Maltese business community should certainly be in favour of such positive developments, as a vehicle for boosting and facilitating cross-border business, however it should advocate that safeguards are included in the draft text to increase legal certainty and avoid the exploitation of new SUPs by large companies for tax avoidance and tax evasion purposes. In addition, we believe that issues such as circumvention of labour laws and standards, right to representation and tax regimes, among others, should be tackled through other vehicles.

#### ***Scope***

It is very hard to be against the scope of the propose, when the purpose is to make it easier for any potential businessman to set-up single-member private limited liability companies across the EU, while ensuring that single member companies established in other jurisdictions would benefit from the same set rules across all Member States. The focus of the proposal is cost reduction and an improvement of the

pan-European business environment. It is considered that once procedures are simplified, it will lead to new business, which is ultimately what the proposal is attempting to achieve.

### ***General Principles***

Article 7(4) of the Commission proposal states that the SUP and its articles of association shall be governed by the national law of the Member State where the SUP is registered. Legitimate concerns have been raised pointing out this is ambiguous and could be used as a loophole for illegitimate purposes such as forum shopping and social dumping. Proponents of such concerns feel that Article 7 (4) should be amended in order to state that the SUP would be governed by the national law of the Member State of where it carries out its core economic activity.

- **The Maltese business community believes that while Article 7 (4) in its current state is ambiguous, it is referring to only the registration process of the SUP. Any other operational matters such as posting of workers, etc. would not be affected. In order to alleviate such fears, article 7 (4) should be amended to reflect this important point. The Council in its general approach has clarified this by saying specifically that the directive is without prejudice to national laws governing matters outside its scope; specifically giving examples such as labour law, posting of workers, co-determination rights, taxation, accounting, insolvency proceedings, rules against money laundering and terrorist financing. The parliament should consider taking this approach in order to clarify matters.**

### ***Online Registration and Articles of Association***

The proposal allows for a standard template for the articles of association, while providing for the registration of an SUP to be completed electronically without the need of a physical presence of the founder before the authorities of the Member State of registration. Registration must be completed within three working days. The lack of a requirement for a physical presence before national authorities does instill an element of legal uncertainty, amid concerns that the system could be used for illicit purposes. The risk can be reduced if Member States agree on rules to ensure security by means of electronic signatures, or identity checks of the founder of the SUP, as well as information sharing among Member States.

The Council, in their General Approach have done away with the notion of a harmonised articles of association altogether, instead vouching for a national template of an instrument of constitution. The business community is very much in favour of having a standard template for articles of association. The lack of consistency and familiarity has long been considered a stumbling block. Also, the Council advocates making the national template available in the official languages of each respective member state, as well as endeavouring to make it available in the languages used in international business.

- **The Maltese business community is in favour of online registration on condition of e-ID verification, as well as the proposal for a minimum standard template for the articles of association, as proposed by the Commission, rather than the Council's concept.**

- There are concerns that the online registration process does not inspire much legal certainty, even if it should be on condition of e-ID verification. This is due to differing requirements in individual Member States, such as, for example, in Germany where an individual is required to obtain a certificate or letter from a notary which states that that individual is capable to start an enterprise. Such concerns can be alleviated if Article 14 (3) is amended to reflect that the online registration process would be without prejudice to the requirements of the Member State of registration.
- The template for articles of association and associated information should also be made available in languages used mostly in international business, such as English and French, as well as the official languages of the relevant jurisdiction. The reason for this is that while SUP might exist to facilitate cross-border business, one of the biggest stumbling blocks - language of registration, will remain. This should be reflected in Article 14 (4).
- We are also very much in favour of IMCO's Amendment 8 stating, "The on-line registration is without prejudice to the Member States' choice of involvement of intermediaries or other bodies in the process of registration of the SUP".

### ***Protection for Creditors***

The Commission's proposal also restricts Member States from requiring a SUP to build legal reserves, but does allow SUPs to build voluntary reserves. However, there seems to be consensus from both the Council and the Parliament to allow Member States to require SUPs to build legal reserves. In order to protect creditors, distribution of dividends to the single-member shareholder can only be made on condition that the SUP satisfies a balance-sheet test, in order to demonstrate that after the distribution, the remaining assets of the SUP will be sufficient to fully cover its liabilities. Also, a solvency statement must be provided to the single-member by the management body before any distribution is made.

- The Maltese business community does not agree with the Commission in restricting Member States from requiring an SUP to build legal reserves. On the contrary, we believe that SUPs should be obliged to build legal reserves, possibly as a percentage on profits. We do, however, agree that a SUP would need to satisfy a balance sheet test and submit a solvency statement.
- Businesses should feel comfortable when working with companies registered as SUPs, and all efforts to protect creditors that do not hinder the scope of the proposal should be considered.

**ENDS**

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