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AK Position Paper

Proposal for a Directive of the European Commission on single-member private limited liability companies (Societas Unius Personae - SUP)

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About us

The Federal Chamber of Labour is by law representing the interests of about 3.4 million employees and consumers in Austria. It acts for the interests of its members in fields of social-, educational-, economical-, and consumer issues both on the national and on the EU-level in Brussels. Furthermore the Austrian Federal Chamber of Labour is a part of the Austrian social partnership.

The AK EUROPA office in Brussels was established in 1991 to bring forward the interests of all its members directly vis-à-vis the European Institutions.

Organisation and Tasks of the Austrian Federal Chamber of Labour

The Austrian Federal Chamber of Labour is the umbrella organisation of the nine regional Chambers of Labour in Austria, which have together the statutory mandate to represent the interests of their members.

The Chambers of Labour provide their members a broad range of services, including for instance advice on matters of labour law, consumer rights, social insurance and educational matters.

More than three quarters of the 2 million member-consultations carried out each year concern labour-, social insurance- and insolvency law. Furthermore the Austrian Federal Chamber of Labour makes use of its vested right to state its opinion in the legislation process of the European Union and in Austria in order to shape the interests of the employees and consumers towards the legislator.

All Austrian employees are subject to compulsory membership. The member fee is determined by law and is amounting to 0.5% of the members' gross wages or salaries (up to the social security payroll tax cap maximum). 560.000 - amongst others unemployed, persons on maternity (paternity) leave, communityand military service - of the 3.4 million members are exempt from subscription payment, but are entitled to all services provided by the Austrian Federal Chambers of Labour.

Rudi Kaske
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Director

Executive Summary

The AK rejects the concept for a new European law form, the Societas Unius Personae (SUP), in its entirety.

The AK also challenges the accuracy of the legal basis of Article 50 TFEU used by the Commission for the proposal, which has been applied by the Commission in order to bypass the requirement of unanimity in the Council. From the point of view of the AK, the proposed Directive, which not only provides for a new law form definition but also stringently regulates, through supranational law, significant elements of the SUP (e.g. capital requirements, the separation of registered offices and central administrations, the electronic registration procedure), is subject to the legal basis of Article 353 TFEU, for which unanimity of the Council is prescribed.

The AK position in detail

Basics

The European Private Company Statute (SPE or European limited company) proposal submitted by the Commission in 2008 did not receive the necessary approval from the Member States in the Council due to substantial differences of opinion between Member States regarding key elements of the SPE (capital requirements, registered office/central administration and co-determination). The Commission therefore withdrew the proposal, which required unanimity in the Council.

The Commission now intends to effectively achieve the European Private Company with this new proposal, relating to the Directive in the area of company law on single-member private limited liability companies. The Member States will be required to introduce an extremely liberal new company law form, the SUP, within the scope of their national company law. The draft Directive stipulates mandatory supranational names for all member states and central key points for the new "national" law form, thereby intervening directly into the company law of the Member States. The national limited liability company law in Austria would be particularly affected. Binding key points of the limited liability company with a single shareholder (SUP) are:

- Abolishment of the minimum capital requirement (1 Euro - SUP)
- No obligation to build reserves
- Application of the law of the Member State in the event of the potential separation of the registered office and central administration.
- Mandatory facilitation of online start-up without requiring the presence of the founder
- Mandatory specification of minimum content for articles of association

The proposed Directive essentially enables any person (natural or legal) to found a company with limited liability, de facto without any minimum capital, with no personal identity checks of the founder, with no preservation of unity of the registered office and central administration, and de facto without any specifications regarding the internal organisation and allowing this company to be active without limitation anywhere in the Union, irrespective of the place of registration. The reason given for the proposal is to support the foundation of foreign subsidiaries.

The legitimate interests of stakeholders, including the rights of workers, creditors, consumers and public interests are completely ignored in the draft Directive. Only the interests of potential founders are taken into consideration and are extensively fulfilled. This should be strictly rejected. Success in business requires the trust of all participants. Company law is therefore necessary to provide a regulatory framework which reflects the interests of both the owner and stakeholders.

By disregarding all stakeholder interests, the Directive represents a welcome instrument for people with dishonest intentions to enrich themselves at the expense of the public, consumers and workers.

The AK considers there to be a major risk that the proposed construct will significantly increase corporate fraud, other criminal activities (e.g. money laundering) and fictitious self-employment. In the construction industry, social insurance, finance, construction workers' holiday funds and workers often lose large sums as a result of fraudulent corporate social constructs. In Austria alone, these losses are estimated at several hundred million Euros per year. As these machinations are also common in the other Member States of the Union, an estimated annual loss of several billion is incurred across the entire Union. The proposed draft Directive would open the floodgates for criminal activities and unfair practices. For instance, people would be able to choose and relocate a "virtual" registered office wherever they like, and conceal their identity using affiliated company constructions branching out across Europe.

The separation of the registered office and central administration could easily be used by the SUP to escape regulatory access and people acting unfairly could effectively play "cat and mouse" with the national authorities and other state institutions at whim. Cross-border administrative cooperation is in fact still its infancy, even from an optimistic point of view, and a great deal of action is still required at a European and national level to improve this situation. In any case, much still needs to be done to achieve a situation where authorities are able to act against unfair practices, irrespective of their nature, in a cross-border context. A unified European company register is as yet unavailable. There is therefore an urgent need to improve this situation before considering further liberalisation.

The SUP would also no doubt constitute a construction which would facilitate and promote fictitious self-employment. It is already common practice in certain industries and sectors within many Member States to formally employ wage earners as self-employed workers and thus deprive them of the protection of labour law, collective agreements and, to some extent, also social law. This has been facilitated in recent decades, especially with regard to legal liberalisation in the fields of commercial and corporate law. The proposed SUP would provide a further boost for fictitious self-employment. If it is possible to found a company as an individual with no expenses or controls, it will be much easier to force workers into fictitious self-employment. This typically also affects those who have a weak position in the labour market and for whom the protection of labour law and collective agreements are most important. Experiences in Germany with the Ich-AG (unemployed individuals starting up their own businesses with self-employed status within a government scheme) have also shown that the ability to form single-person companies encourages fictitious self-employment. For entrepreneurs, it is usually more attractive to "commission" an "Ich-AG" than employ a person as an worker. Wage and social dumping is inevitable if the proposed Directive is implemented. The disadvantages will be borne by the most vulnerable in the labour market.

Although the Commission claims that it is acting for the benefit of SMEs, this concept also demonstrates that internationally active company groups which organise their widespread network through 100% owned subsidiaries and which often employ thousands of workers will be given a great deal of freedom by eliminating the requirement for unity of the registered office and central administration, which will be particularly to the detriment of worker participation. The AK is strongly opposed to a compromise of worker

participation. It is an essential component of the European social model, part of European corporate governance and must be protected against avoidance schemes.

The most important key points of the proposed Directive include:

Abolishment of the minimum capital requirement - 1 Euro SUP (Article 16)

The Directive requires Member States to establish a minimum share capital of only 1 Euro for the SUP. Furthermore, Member States cannot require the formation of statutory reserves.

The Commission's proposal will result in deliberate confrontation with those Member States that have already spoken in favour of substantial minimum capital and consequently the acceptance of corporate risk by the founder during the negotiations for a European private company. The new proposed Directive regarding the capital requirements of the SUP is therefore strongly rejected.

A limitation of liability for the SUP at "zero tariff" is inconceivable for the AK. Such a policy encourages abuse to the detriment of third parties (consumers, suppliers, statutory creditors), as it sends out a signal that entrepreneurial risk is to be assumed by the general public. This is totally unacceptable and largely contradicts the market economy principle. Privatising profits and socialising risk cannot be the European way. However, the minimum capital also has great significance as a solidity threshold, as it signals to the company founders that a risk contribution needs to be paid to qualify for a limitation of liability, and that the opportunities and risks of projects must be carefully considered.

The National Council recently withdrew key points of the GmbH-Novelle (Austrian limited liability company amendment) decided upon in June 2013 for good cause and increased the minimum capital for limited liability companies back to the original level of 35,000 Euros. Attractive framework conditions were established for start-ups applicable for a period of 10 years, although minimum capital of 10,000 Euros is also required in these cases. In Austrian legislature, it is not in dispute that the privilege of limited liability requires a substantial risk contribution by the company founder.

The limited liability company is by far the most important corporate entity in Austria. More than 110,000 companies operate using this law form. Without knowing exact figures, it can be assumed that about half of these limited liability companies are one-person limited liability companies. They would fall within the scope of the Directive. The negative effects for national company law associated with the implementation of the proposal are currently incalculable. It can be expected, however, that the Austrian principles of company law applicable to corporate entities (minimum capital, notarial act, unity of registered office and central administrations, workers' participation) will be called into question and the national standards relating to creditor and consumer protection and workers' rights will be put at serious risk in the medium term. This is even more the case owing to the fact that the SUP can also be established by changing the law form of a national limited liability company (Article 9).

The proposed Directive for a SUP - also known as an Ich-AG - is therefore in stark contrast to the national principles of company law for limited partners and, from the point of view of the AK, a

violation of the principle of subsidiarity enshrined in the Union Treaty - unless the legal basis for the intended draft is amended. A subsidiarity objection on the part of Austria should therefore also be taken into consideration.

The role of unifying the registered office and actual central administration office (Article 10)

In conjunction with Recital 12, Article 10 of the proposed Directive stipulates that the registered office and central administration of the company do not need to be located in the same Member State. During the discussions regarding the the European Private Company, the AK voiced its opposition to the abandonment of unifying the registered office and central administration.

Linking the company's registered office to the actual location of the central administration not only protects creditors and consumers, but is also of major importance with regard to securing worker's rights, workers' participation and for tax law reasons. It is, therefore, impossible to rule out that national tax laws may be circumvented during formal registration in low-tax countries and that workers' participation in the business could be undermined by formally relocating the statutory registered office and the consequent change of the company's articles of association. The provision stipulated in Article 7 (4), according to which the company will be subject to the law of the Member State in which the company is registered, could also have adverse consequences for the rights of workers if the founder's aim is to separate the registered office and administrative centre in order to avoid stricter rules.

If the statutory registered office and administrative centre are separated, it will also make it more difficult to enforce claims, as the service of the writ needs to be addressed to the statutory registered office in all cases and a legally effective awarded claim would need to be enforced in the country of the registered office. Experience to date indicates that international service of writ is difficult despite the European legal regulations (Regulation (EC) No 1348/2000, EU Insolvency Regulation), so that both the judicial claim and the enforcement of a claim take considerably more time and would involve more difficulties.

Companies founded in accordance with Austrian law would be required to have a registered office and administrative centre in Austria. This should also apply to the SUP. In this regard, attention is drawn to the fact that so far, all supranational law forms (SE, European Cooperative Society) have been required to have unified registered offices and administrative centres.

Enabling complete online registration with no personal identity checks for the company founder (Article 14)

The electronic registration process envisaged by the Commission in Article 14, which does not require the founder to appear before any authorities (notary) is a further element which favours the formation of companies with fraudulent intentions. It is difficult to verify a person's identity electronically. It is therefore much easier to found a SUP using forged documents or stolen identities in order to consequently cause losses for creditors and consumers and commit social or tax fraud. For instance, labour law consultant practices are increasingly confronted with fraud in the construction industry and related trades as well as in the (small load) transport sector, where the identity of the employer is obscured. It is therefore possible for employers to avoid liability and responsibility for the payment of outstanding

claims and the Insolvency Remuneration Fund in most cases rejects such claims due to lack of details about the employer. As a result, workers do not receive remuneration for outstanding claims and therefore render their work performance with no financial consideration. There is a serious risk that, if the identity of the company's founder is no longer verified, the existing problem will become greatly enhanced and spread to other sectors. The absence of security standards will result in complete non-transparency with regards to the identity of the contractual partner and would fully undermine the existing reliability of the course of legal business.

Reference is made in this connection to the efforts of the Commission in the fight against money laundering. In this regard, the proposed Directive is counter-productive to the highest degree. From the point of view of the AK, the proposal of the Commission should be completely rejected and the involvement of the notary as a checking and clarification authority, as currently established in Austria, should also be required for the SUP.

Profit distributions following solvency certificate by the management body (Article 18)

Despite the abolition of the minimum capital requirement, the draft does not provide for any extension of liability for the shareholders or the bodies of the SUP. The only envisaged action to protect third parties is that it would only be possible to distribute profits if the director has issued a solvency certificate. However, this measure is in any case not suitable to justify the avoidance of the minimum share capital.

A director who is required to follow instructions and can be dismissed at any time cannot impartially issue a solvency statement and, if the director were to do so, they can be replaced at any time by a shareholder who is interested in a distribution of profit. The construction is therefore impractical. Furthermore, the sole shareholder may also be the director. In this case, the solvency statement would be issued by the recipient, and it is naturally impossible to be impartial in such a situation. Furthermore, the director may be a corporate body. It is unclear how personal liability in accordance with Article 18 (5) would apply in such a case. In this context, the legal enforcement of withdrawals involving solvency risk is questionable, especially in Member States with lower legal standards.

A solvency statement should in all cases be issued by an independent external auditor who is also personally liable if they were aware or should have been aware that the profit distribution is not possible in light of the financial situation. In addition, all transactions to bodies of the company (e.g. salary and other benefits to directors, self-dealing transactions with the shareholders)would need to withstand a possible third-party comparison by an external auditor.

Additional comments:

Regarding Article 4

It is absurd to speak of a single-member company. By nature, a company must always involve two or more people. It is also absurd to speak of shareholder meetings in connection with a single-member company. Who would the single shareholder hold a meeting with? How would such a meeting be convened? How would resolutions be passed?

The requirement that resolutions, which can practically only include decisions by the single shareholder, need to be in writing, is only reasonable to a very limited extent. In practice, this provision would not usually be adhered to,

as establishing the decision in writing would be of little purpose to the shareholder or other individuals. Even if the director or other third party had access to this written resolution, no one would be able to rely on it, as the director could change their decision at any time by passing a "resolution".

Regarding Article 5

Contracts naturally need two contractual partners. In the case of a single-member company, this is simply not possible. The listed contracts are therefore highly problematic "self-dealing transactions".

Paragraph 2 is unclear. It raises the question of whether a contract, which a person concludes with "their own" single-member company, i.e. essentially with themselves, is valid even if it has only been concluded verbally. How can a contract actually be concluded verbally? In any case, it is problematic to permit such constructs or describe them as a contract. In fact, these are simply decisions which have been made by the director.

Regarding Articles 6 to 8

According to Article 6 (2) in conjunction with Article 8, the SUP can be sole shareholder of another SUP or sole shareholder of a single-member company under national law.

The option to found a company online, the separation of the registered office and administrative centre, extensive freedom for internal organisation and the lack of mandatory liability capital make the SUP a welcome tool for a wide range of manipulations and unfair practices. Unclear affiliated company SUP constructions can be founded with practically no financial expenses - from someone's living room - and would in actuality no longer be transparent.

The victims are workers, creditors, consumers and the public sector. It would therefore be impossible for the authorities and social security institutions to keep control of these machinations. The damages incurred and additional lost revenue for social security contributions, taxes, etc. as a result are difficult to estimate, but a further loss of several hundreds of millions of Euros in Austria alone over the next few years is certainly not unrealistic.

Regarding Article 11

The proposed Directive not only specifies central elements of the SUP as mandatory requirements, but the Commission also intends to establish a standard template for the articles of association. The presentation of a uniform template for the articles of association is further evidence that the SUP is a new supranational law form which requires unanimity in the Council.

Regarding Article 15

Paragraph 3 allows multiple individuals to start a single-member company. This demonstrates that there is confusion even at the theoretical level. The proposal not only provides for the absurd idea of a company being founded by a single person, but also the option of founding a single-member company by several individuals. This scope of design, which is confusing in terms of even the basic construction, would cause serious problems in practice. Company law, which should ensure a regulatory framework, a balance of interests and transparency in economic life, is of no benefit if it introduces such confusion to business transactions.

Concluding remarks

The AK once again reaffirms its strong rejection of this Directive. It undermines the rights of the stakeholders, puts worker participation at risk and forces "forum-shopping" - and consequently competition - towards the weakening and destruction of minimum standards under corporate law. This Directive does not create any economic added value. The AK invites the responsible national authorities, particularly the Ministry of Justice, the Ministry of Labour, Social Affairs and Consumer Protection and the Ministry of Finance to take steps to ensure that the Commission's proposal is withdrawn.

Should you have any further questions
please do not hesitate to contact

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