

The Societas Unius Personae (SUP)

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1. INTRODUCTION

The European Commission has initiated several projects that relate to simplifying the conduct of business within the European Union (EU), in order to enhance the access to the internal market and improve the business environment.¹ In particular, the small and medium-sized enterprises (SMEs) are the target group of these initiatives.² The European Commission emphasizes that research has shown that there is a direct link between internationalization and increased SMEs' performance. Those SMEs that had international operations have reported stronger turnover growth, higher rates of job creation and increased innovation capacity.³ SMEs which were active outside of their countries had substantial potential to boost growth, e.g., SMEs with foreign direct investment showed four times higher employment growth than non-active SMEs.⁴ Some even say that businesses that focus primarily, or even exclusively, on the domestic market have to become competitive internationally in order to secure long-term survival and growth.⁵ The single market for goods and services is perceived as one of the main drivers of Europe's economy. It is the EU's central mission to secure an increased market integration and to remove obstacles to the free movement of goods, services, capital and to the freedom of establishment.⁶ The EU promotes the

notion that supporting SMEs to internationalize is in the public interest. However, research on the internationalization of SMEs in the EU shows that foreign direct investment (consisting of the establishment of a subsidiary,⁷ a branch office or a joint venture in another country) of SMEs is very low.⁸ The question arises why there is such a low number of companies or individual entrepreneurs expanding their business within the EU by setting up a subsidiary, branch or joint venture abroad. SMEs still face obstacles in taking full advantage of the opportunities of the single market. The barriers perceived as most relevant are: price (competition) of own products, lack of capital and information, high cost of internationalization and inadequate public (institutional/governmental) support.⁹ The study, on which several statements of the European Commission on the internationalization of SMEs are based, does not mention rules and regulations for the establishment of a subsidiary as a stand-alone barrier. The category 'external barriers' includes the barrier: 'Other laws and regulations in foreign countries' is therefore a much broader category. About 30% of the respondents are of the opinion that this barrier plays an important role in the EU-EEA markets and is perceived to be more important by the larger SMEs.¹⁰ In a public consultation in 2013 (2013 Consultation),

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1 Europe 2020 COM(2010)2020, An Integrated Industrial Policy for the Globalisation Era COM(2010)614, Small Business Act, Review of the Small Business Act COM(2011)78, Single Market Act I COM(2011)206, Single Market Act II COM(2012)573, Action Plan: European company law and corporate governance – a modern legal framework for more engaged shareholders and sustainable companies', COM(2012)740/2.

2 SME stands for small and medium-sized companies as defined in EU law (EU recommendation 2003/361).

3 European Union (2010), 'Final report on the Internationalisation of European SMEs', Brussels: Entrepreneurship Unit and OECD (2009), 'Top Barriers and Drivers to SME Internationalisation', Report by the OECD Working Party on SMEs and Entrepreneurship, OECD, p. 7. Internationalization consists of exporting, importing, foreign direct investments (FDI), international technical cooperation and subcontracting.

4 European Commission (2014), 'Proposal for a Directive on single-member private limited liability companies – frequently asked questions', MEMO/14/275.

5 N. Karagozoglu & M. Lindell, *Internationalization and Small and Medium-Sized Technology-Based Firms: An Exploratory Study*, 36 J. Small Bus. Mgt. 44–59 (1998).

6 http://ec.europa.eu/enterprise/policies/sme/market-access/index_en.htm. The freedom of establishment is included in Arts 49 and 54 of the Treaty on the Functioning of the European Union (TFEU). Art. 49 prohibits restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State. Art. 54 extends that prohibition to companies and firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Union.

7 It is not clear what the definition of a subsidiary is. The impact assessment relating to the single-member private limited liability company states the following: 'Generally, a company is a "subsidiary" of another company if the latter: (1) holds a majority of the voting rights in it, or (2) has the right to appoint or remove a majority of the members of its administrative, management or supervisory bodies, or (3) has the right to exercise a dominant influence over the former company.' European Commission (2014), 'Impact Assessment: Accompanying the document Proposal for a Directive of the European Parliament, SDW(2014)124, pp. 7–8.

8 Establishing a subsidiary in another country together with branch offices and joint ventures falls into the category of Foreign Direct Investments (FDI). About 2% of the respondents (n = 9480) have made FDIs (p. 15 and 20). This amounts to about 500,000 SMEs in Europe. Most of the 2% of all SMEs that have invested abroad limit themselves to one country (71%): p. 21. The relevant activities of the investments are: foreign subsidiary (42%), branch (20%), joint venture (22%) and no answer (16%). However, another survey mentioned that 5% of EU SMEs have subsidiaries or joint ventures abroad: European Commission and the Gallup Organisation (2007), 'The Observatory of European SME 2007', p. 55.

9 European Union (2010), 'Final report on the Internationalisation of European SMEs', Brussels: Entrepreneurship Unit, p. 57. It is important to mention that all information on barriers resulting from the survey actually refers to the perception of barriers as expressed by SMEs themselves not necessarily to actual barriers.

10 European Union (2010), *supra* n. 9, p. 60.

which mainly concentrated on corporate law aspects, respondents were asked why it is difficult to move or expand a commercial activity/trade by setting up a branch or subsidiary abroad (within the EU). Legal advice costs relating to the set-up of a company and compliance costs with foreign legislation on company law issues were indicated as factors influencing the expansion.¹¹

In the EU, the design of laws and regulations for corporations is to a large extent at the discretion of Member States. This results in divergent requirements in national legislations across the EU regarding company law. Developing business presence in another Member State thus means that an entrepreneur is confronted with a different legal regime and accompanying procedures, and therefore costs. In light of this, the European Commission presented a proposal for a Council Regulation on the Statute for a European Private Company (SPE) in June 2008,¹² a supranational company form that, in short, would make it easier for companies to do business across the EU. Despite strong support from the business community, it was not possible for Member States to reach unanimous agreement on the proposal due to differences of opinions on a number of contentious issues such as minimum capital, employee co-determination and the separation between central administration and registered office. Consequently, the Commission withdrew the SPE proposal in its REFIT exercise.¹³

2. NEW INITIATIVE ON SMES MOBILITY WITHIN THE EU

The difficult issue for the European Commission was how to proceed and realize the aim of making it easier for SMEs to internationalize. The withdrawal of the SPE proposal did not stop the European Commission from taking further action relating to the corporate rules and regulations dealing with SMEs. The outcomes of a broad public consultation on the future of European company law in February 2012 (2012 Consultation)¹⁴ included the view that a majority of the respondent supported

consideration of alternatives to the SPE Statute to assist European SMEs engaged in cross-border activities. In particular an instrument labelling existing national company law forms that meet a number of pre-defined harmonized requirements was viewed as a suitable alternative. Subsequently, the Commission formulated the aim of continuing to explore means to improve the administrative and regulatory framework in which SMEs operate.¹⁵ On the basis of data provided by the national authorities from twenty-four Member States, the European Commission estimated that around 44% of all existing private limited liability companies are single-member.¹⁶ For that reason and on the basis of a recommendation of the Reflection Group on the future of EU company law regarding the establishment of a single-member company,¹⁷ the European Commission switched to an alternative proposal focussed on single-member private limited liability companies (SMPLLCs). In April 2014, this new proposal for a Directive of the European Parliament and of the Council on SMPLCCs (DSUP) was published. In contrary to the SPE proposal, this proposal does not include a supranational company form, but Member States would be obliged to provide in their national legislation for a company law form for SMPLLCs with particular requirements that are the same across the EU, the *Societas Unius Personae* (SUP).¹⁸ The European Commission presented the new proposal despite the fact that the 2012 Consultation showed that there was lower support from the respondents for the creation of a simplified single-member company charter than for labelling of national company forms or continuation of the work on the SPE. Although there was the least demand expressed for reform of the 12th Company Law Directive – which is the directive on SMPLLCs which was adopted in 1989 (89/667/EEC) and codified in Directive 2009/102/EC – during the 2012 Consultation,¹⁹ some voices argued for revision.²⁰ This Directive provides for limited harmonization of the relevant national laws by requiring that companies may have a single-shareholder in all Member States and regulating the powers

11 Response statistics for 'Single-member limited liability companies' question 4: http://ec.europa.eu/internal_market/consultations/2013/single-member-private-companies/index_en.htm. Compliance costs with foreign legislation on company law issues (translations, registration requirements/fees, capital requirements, reporting, operational/running costs including legal advice related to it: 47.9%). Legal advice costs related to the set-up of the company in the foreign legal system: 41.7%. Other possible answers were: difficulty of financing due to cross-border dimension (40.5%), lack of knowledge/trust of foreign company law forms (40.1%), other (25.2%) and I do not know (13.2%).

12 European Commission (2008), 'Proposal for a Council Regulation on the Statute for a European Private Company', COM(2008)396/3.

13 European Commission (2013), '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 on "Regulatory Fitness and Performance (REFIT): Results and Next Steps"', COM(2013)685, p. 9 and European Commission (2013), "'REFIT – Fit for growth": Examples how EU law is becoming lighter, simpler and cheaper', Memo 13/833.

14 European Commission (2012), 'Consultation on the Future of European Company Law', and 'Feedback Statement: Summary of Responses to the Public Consultation on the Future of European Company Law', July 2012: http://ec.europa.eu/internal_market/company/modern/index_en.htm#consultation2012.

15 European Commission (2012), *supra* n. 14, p. 13.

16 There are big differences in the number of such companies between the Member States, for instance, Spain has less than 15% whereas the Netherlands has more than 70%. European Commission (2014), *supra* n. 7, p. 10.

17 The Reflection Group suggested the introduction of such an entity in order for groups of companies with operations in various EU Member States to have a simple vehicle available for the establishment of subsidiaries. European Commission (2011), 'Report of the Reflection Group On the Future of EU Company Law', p. 57.

18 With the DSUP the European Commission has changed the adoption procedure from that of the SPE proposal (from unanimous voting to a qualified majority) and has – in its own opinion – reduced the number of contentious issues, which should make it easier to reach a compromise among Member States.

19 European Commission (2012), *supra* n. 14, p. 5.

20 European Commission (2012), *supra* n. 14. As a response to the expressed opinions of respondents favourable to other alternatives than initiatives related to SMPLLCs, the European Commission has argued that – on the basis of the reforms undertaken autonomously by Member States so far and any future planned developments – it would still not be possible to have identical requirements for a particular company type across the EU and award a label that would be recognized across the EU: European Commission (2014), *supra* n. 7, p. 22.

of that single-member in relation to the company. The DSUP will repeal the 12th Company Law Directive and is more extensive on several issues.²¹

A key objective of the DSUP is to make it easier and less costly for foreign founders to establish a legal entity in another Member State. The DSUP, therefore, introduces an obligatory simplified full electronic registration without it being necessary to appear before any authority.²² Such a registration is a new element in the European legislation relating to the establishment of a company.²³ The majority of the Member States welcome the intentions of the DSUP, nevertheless, more than a few concerns have been expressed by different parties across Europe. A large part of the concerns is related to the electronic registration and establishment of the SUP.²⁴ This article sets out a short overview of and analyses the rules on registration and establishment of the SUP that are included in the proposal.

3. ESTABLISHMENT OF A *SOCIETAS UNIUS PERSONAE*

The DSUP obliges Member States to make available in their national legal orders a national company law form for a SMPLLC with a number of harmonized rules including formation and registration rules. Member States would have the choice of how to introduce such a company form, e.g., by replacing an already existing national form with the SUP or by creating an additional form, which would be the SUP.²⁵ Natural and legal persons should have the opportunity to incorporate an SUP.²⁶ The founder should be a resident of the EU or should have a seat in the EU. A cross-border element is not required for the formation of an SUP or its existence.²⁷ Therefore, the SUP is not exclusively available for businesses that want to expand to another Member State by setting

up a new subsidiary abroad. Legal entities that just want to be active within the territory of the Member State of origin also have the opportunity to establish an SUP as a subsidiary in the State of origin. As with the SPE, there is no size restriction. Companies of all sizes will be able to establish an SUP. As a result groups of companies can also swiftly register a subsidiary. Entrepreneurs (natural persons) that want to establish a legal entity for their business are allowed to use the SUP form as well. It is not a requirement for SUPs to be a subsidiary company. The DSUP ordains that a company that has the legal form of an SUP and operates in compliance with the DSUP would use the abbreviation SUP in its name, thereby creating distinguishability.²⁸ There are two types of formation of an SUP; formation *ex nihilo* and formation through conversion. Both processes will be discussed. As the registration procedure for the formation *ex nihilo* is one of the significant elements – if not the most significant element – of the DSUP, this process will be looked at in detail.

3.1. Formation *ex nihilo*

Paragraph 3 of Article 14 DSUP instructs Members States to make online registration available for the *ex nihilo* formation of SUPs. Member States should offer the possibility of completing the whole registration process electronically, without it being necessary for the founder to appear before any authority in the Member State of registration, such as a notary. In addition, they can choose to provide the possibility to establish an SUP on paper as a second procedure. The impact assessment states that in sixteen Member States a possibility of direct online registration via digital accounts without the necessity of the prior involvement of a notary/attorney exists.²⁹ In many cases the use of specific national e-signatures or e-identification is necessary. In the remaining twelve Member

21 It deals with the formation, registration and conversion procedures, articles of association, (minimum) share capital, distributions and to a lesser extent with decision-making and instructions, board structure, representation and delegated powers. The DSUP includes a variety of mandatory harmonized rules in combination with discretion of the Member States to apply national law.

22 European Commission (2014), *supra* n. 7, pp. 1–23 and European Commission (2014), *supra* n. 4.

23 This kind of registration is a preferred option chosen by the majority of the stakeholders that participated in the 2013 Consultation. About 61.2% of the respondents shared the view that a potential directive on SMPLLCs should include simple rules for online registration of the company with one common standard registration form throughout the EU. Response statistics for ‘Single-member limited liability companies’, under IV Substance – a potential initiative on single-member limited liability companies, question 1: http://ec.europa.eu/internal_market/consultations/2013/single-member-private-companies/.

24 VNO-NCW and MKB Nederland (2014), ‘Reactie VNO-NCW en MKB-Nederland op richtlijnvoorstel besloten eenpersoonsvennootschappen met beperkte aansprakelijkheid’, p. 2, Reactie van het kabinet, brief van de Minister van Buitenlandse zaken van 24 mei 2014, *Kamerstukken II* 2013/2014, 22 112, nr. 1856, Parlement Republik Österreich (2014), ‘V-5 Beilagen zu den Stenographischen Protokollen des Nationalrates XXV. GP: Beratungen des Ständigen Unterausschusses des Hauptausschusses in Angelegenheiten der Europäischen Union (Auszugsweise Darstellung)’, 28 Mai 2014, p. 3. Notaries of Europe (2014), *Proposal for Directive on creation of single-member private limited liability companies not acceptable as it stands*, press release 9 Apr. 2014: <http://www.notaries-of-europe.eu/news/press-releases/directive-sup-cp>, Bayerisches Staatsministerium der Justiz (2014), ‘Bayern Justizminister Bausback kritisiert neue europäische Ein-Personen-Gesellschaft: ‘Eine derart missbrauchsanfällige Rechtsform gefährdet die Sicherheit im Geschäftsverkehr’, Pressemitteilung 10 Apr. 2014: <http://www.justiz.bayern.de/presse-und-medien/pressemitteilungen/archiv/2014/50.php>, Bundesrat (2014), ‘Beschluss des Bundesrates: Vorschlag für eine Richtlinie des Europäischen Parlaments und des Rates über Gesellschaften mit beschränkter Haftung mit einem einzigen Gesellschafter’, Ratsdok. 8842/14 Drucksache 165/14, 11 Jul. 2014. See also: http://www.bundesrat.de/DE/plenum/plenum-kompakt/14/924/023.html?cms_selectedTab=section-3, Syndicat Europeen Trade Union (2014), ‘ETUC position on single-member private limited liability companies’, 11 Jun. 2014: <http://www.etuc.org/documents/etuc-position-single-member-private-limited-liability-companies#>. VFqXODWLnw, European Economic and Social Committee (2014), ‘Opinion of the European Economic and Social Committee on the Proposal for a Directive of the Parliament and of the Council on single-member private limited liability companies’, INT/744, 13222/14 DGG 3 B, LM/vp, p. 3 and 5.

25 Recital 10 DSUP and Arts 1 and 6 para. 1 DSUP, Annex I to the DSUP.

26 Recital 11 DSUP and Art. 8 DSUP.

27 Article 8 DSUP. See also Recital 11 DSUP.

28 Article 7 para. 3 DSUP.

29 European Commission (2014), *supra* n. 7, p. 27. Those countries are: Bulgaria, Denmark, Estonia, Finland, France, Ireland, Latvia, Lithuania, Malta, Poland, Portugal, Romania (in case there is no contribution in kind being an immovable property), Slovakia, Slovenia, Sweden and the UK.

States, there is no possibility of direct online registration but instead in some of these countries an indirect electronic registration process exists, which is electronic registration but then by an intermediary such as a notary or legal advisor.³⁰ Notaries or other intermediaries may be involved in the website portal which facilitates the registration and the issuance of a certificate of registration when Member States choose to do so.

3.1.1. DSUP and Registration

The DSUP provides that Member States would decide how they organize their registration systems, but the DSUP limits the information and documentation that can be requested by the Member States for the registration of the SUP. In addition, a registration template and uniform template of articles of association provided by the European Commission should be used.³¹ This limitation and harmonization of the registration procedure is supposed to decrease the costs that businesses face as a result of the diverse legal and administrative requirements. Yet, it seems that there is room for Member States to determine the acceptability of the documents and other information submitted to the registration body.³² They can determine which information they deem appropriate in light of a desired identification process of: (1) the founding member, (2) the beneficial owner if applicable, (3) a representative that registers the SUP on the member's behalf, and (4) an intended representative of the SUP. The DSUP does not define what kind of information this should be. There is also no definition given of the 'beneficial owner'.³³ The impact assessment relating to the DSUP explains that the identification of the founder could be done electronically by using e-signatures or any other

means as it is the case now in those Member States that already have direct online registration available to foreign founders. In addition, the impact assessment states that, the authorities of the place of registration of a company could, for example, apply the technical solutions referred to in the eIDAS regulation³⁴ or provided under the Internal Market Information System (IMI) in order to exchange information about the identity of the founders.³⁵

In addition to the discretion of Member States concerning the requirement of identification information, Member States are actually free to choose whether they would like to lay down rules for the verification of the identity of the founding member and any other person making the registration on the member's behalf or whether they would decide not to. The proposal includes the wording 'may lay down rules' instead of 'shall lay down rules'.³⁶ If the observation above is correct, some of the Member States will have sufficient checks because they think highly of a profound identification process whilst other Member States may not. In addition, founders of an SUP may be confronted with potentially twenty-eight different identification procedures that may come into force with different levels of information required.³⁷ To mitigate the risk of developing a burdensome and complicated identification process for (legal) persons residing in a different Member State than the Member State of registration, the DSUP affirms that Member States have to recognize and accept any identification issued in another Member State by authorities of that state or on their demand for the purposes of verification of the identification by the Member State of registration. The DSUP provides:

30 Austria, Belgium, Croatia, Cyprus, Czech Republic, Germany, Greece, Hungary, Italy, Luxembourg, the Netherlands and Spain. European Commission (2014), *supra* n. 7, p. 29.

31 The Commission shall establish, by means of an implementing act, a template to be used for the registration of SUPs in the registers of companies of the Member States in accordance with Art. 13 para. 1 DSUP.

32 Article 14 para. 5 DSUP.

33 Problems that may arise because of the absence of a definition of beneficial owner, see: The Joint Committee of the European Supervisory Authorities' Sub Committee on Anti Money Laundering (2012), 'Report on the legal, regulatory and supervisory implementation across EU Member States in relation to the Beneficial Owners Customer Due Diligence requirements under the Third Money Laundering Directive [2005/60/EC], JC/2011/096 AMLTF/2011/05, p. 6 and 9-13 and European Commission (2012), 'Report from the Commission to the European Parliament and The Council on the application of Directive 2005/60/EC on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, COM(2012)/168 final, pp. 9–10.

34 Regulation (EU) No. 910/2014 of the European Parliament and of the Council of 23 Jul. 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC, L257/73, also known as the eIDAS Regulation. This regulation provides for a regulatory environment for the mutual recognition at EU level of electronic identification schemes and of electronic trust services.

35 Regulation (EU) No. 1024/2012 of the European Parliament and of the Council of 25 Oct. 2012 on administrative cooperation through the Internal Market Information System and repealing Commission Decision 2008/49/EC ('the IMI Regulation').

36 Article 14 para. 5 DSUP: 'Member States may lay down rules for verifying the identity of the founding member and any other person making the registration on the member's behalf, and the acceptability of the documents and other information submitted to the registration body (...)'.

37 A similar situation exists relating to the identification procedure of beneficial owners regarding the Third Anti-Money Laundering Directive (Directive of the European Parliament and of the Council of 26 Oct. 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, 2005/60/EC). This directive provides that all Member States should require their financial institutions to identify their customers' beneficial owners. A report of the Joint Committee of the European Supervisory Authorities (AMLC) shows that the way Member States expect their financial institutions to identify their customers' beneficial owners differs. This means that the institutions in different Member States might come to a different conclusion as to who is the ultimate beneficial owner of the same customer: The Joint Committee of the European Supervisory Authorities' Sub Committee on Anti Money Laundering (2012), *supra* n. 33, p. 5. See also Deloitte (2010), 'Final Study on the Application of the Anti-Money Laundering Directive', (http://ec.europa.eu/internal_market/company/docs/financial-crime/20110124_study_aml_en.pdf). The AMLC considers that there is a risk that these differences carry the potential to affect the effectiveness of the European anti-money laundering and counter-terrorist financing regime negatively and invited the European Commission to consider whether work to foster convergence of national beneficial ownership identification standards is appropriate in light of the proposed Fourth Anti-Money Laundering Directive. Nonetheless, this proposal (which would replace the third directive) does not include a harmonized identification procedure (European Commission (2013), 'Proposal for a Directive of the European Parliament and of the Council of the prevention of the use of the financial system for the purpose of money laundering and terrorist financing', COM(2013)45 final).

Any identification issued in another Member State by the authorities of that State or on their behalf, including identification issued electronically, shall be recognised and accepted for the purposes of the verification by the Member State of registration. Where, for the purposes of the first subparagraph, it is necessary for Member States to have recourse to administrative cooperation between them, they shall apply Regulation (EU) No 1024/2012.³⁸

As a consequence, one might think that there is a risk of untrustworthy identification that has to be recognized and accepted by the other Member States. Many Member States and other parties have expressed their concerns on this issue.³⁹ The DSUP impact assessment acknowledges the potential risk of fraudulent use of the direct online registration. But additionally notes that this risk 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. It argues that such risk already exists, and was taken into account, by those sixteen Member States that already have a direct online registration procedure. However, these countries are not under the obligation of recognizing and accepting the identification issued by other Member States or on their behalf. The eventual risks of Article 14 DSUP are dependent on the legal and operational framework within which the registration procedure should be performed.

3.1.2. Service Directive

Closely related to the electronic registration as provided by the DSUP are the rules that are laid down the Services Directive.⁴⁰ With this Directive, the EU intends to facilitate SMEs to provide services across the border of Member States by removing unjustified or disproportionate legal and administrative barriers to the setting up of a business by a service provider or to its cross-border activities in the EU. It requires Member States to ensure that all procedures and formalities necessary to access a service activity can be completed at a distance and by electronic means through a point of single contact (PSC) and with the relevant competent authorities,⁴¹ be it nationally or in another Member

State.⁴² Electronic means have to be available for the whole administrative process, from the service provider's initial application/submission of documents to the final reply, if required, from the relevant competent authority.⁴³ Member States have to give each other mutual assistance, and the Directive provides that they shall put in place measures for effective cooperation with one another, in order to ensure the supervision of providers and the services they provide.⁴⁴ It also has put the European Commission under the obligation to adopt detailed rules for the facilitation of the interoperability of information systems and use of procedures by electronic means between Member States, taking into account common standards developed at Community level.⁴⁵ In light of this, Regulation (EU) No. 1024/2012 (IMI Regulation) has been adopted that deals with administrative cooperation through the IMI System. This IMI system assists Member States with the practical implementation of information exchange requirements laid down in Union acts by providing a centralized communication mechanism to facilitate cross-border exchange of information and mutual assistance. This mutual assistance mostly consists of requests of information between Member States and the (quick) response to the request. It does not contain any provisions on the content of such information or the acceptance thereof. The reference to the IMI Regulation in the DSUP, therefore, primarily relates to the (technical) process of the acceptance and recognition of foreign identification. Another European initiative that deals with cooperation between public authorities is Directive 2012/17/EU regarding the interconnection of central, commercial and companies registers.⁴⁶ This Directive improves cross-border access to business information, ensuring that up-to-date information is stored in the register of branches and establishing clear channels of communication between registers in cross-border registration procedures.⁴⁷ It also obliges Member States to ensure that companies have a unique identifier allowing them to be unequivocally identified in communication between registers through the system of interconnection of central, commercial and companies registers. That unique identifier shall comprise, at least, elements making it possible to identify the Member State of the register, the domestic register of origin and the company number

38 Article 14 para. 5 DSUP.

39 See *supra* n. 24.

40 Directive 2006/123/EC of the European Parliament and of the Council on services in the internal market, OJ L 376/36.

41 Article 28 para. 2 Services Directive.

42 Article 8 – Procedures by electronic means: '1. Member States shall ensure that all procedures and formalities relating to access to a service activity and to the exercise thereof may be easily completed, at a distance and by electronic means, through the relevant point of single contact and with the relevant competent authorities.'

43 Directorate-General for Internal Market and Services (2007), 'Handbook on implementation of the Services Directive', p. 22: http://ec.europa.eu/internal_market/services/services-dir/index_en.htm.

44 Article 28 para. 1 Services Directive.

45 Article 8 para. 3 Services Directive.

46 Directive 2012/17/EU of the Parliament and of the Council amending Council Directive 89/666/EEC and Directives 2005/56/EC of the European Parliament and of the Council as regards the interconnection of central, commercial and companies registers, OJ L 156/1. This Directive requires a Business Registers Interconnection System (BRIS) to be established. The technical details of this system will be adopted through an implementing act, which will be prepared by the Commission by 7 Jul. 2015. Member States will then have another two years to transpose the remaining rules and make the necessary preparations for connecting to the new system. When the Directive is fully transposed, BRIS will make it easy to access information on EU companies via the e-Justice or other national portals.

47 Recital 61 Directive 2012/17/EU *supra* n. 46.

in that register and, where appropriate, features to avoid identification errors. In addition to the initiatives described above, the e-Signature Directive plays an important role with regard to the Service Directive as well, and may do so for the DSUP in the future.⁴⁸ The e-Signature Directive is content related and provides for a harmonized and appropriate legal framework for the use of electronic signatures by ensuring the recognition of all electronic signatures as evidence. Member States have to accept foreign e-signatures and make available information needed for cross-border validation of e-signatures. Member States also have to make available technical solutions for common formats of e-signatures.⁴⁹ This covers the full range of electronic signatures – no matter what their form or technology used – from ‘simple’ to ‘advanced’ electronic signatures.⁵⁰

In addition to the cooperation between Member States, the Services Directive obliges Member States to review and evaluate all their authorization schemes concerning access to a service activity or the exercise thereof and abolish them or replace them by less restrictive means (such as simple declarations), where they are unnecessary or otherwise disproportionate. Remaining schemes are to be rendered clearer, more transparent and must be in line with a few conditions such as the need for an authorization scheme justified by an over-riding reason relating to the public interest.⁵¹ The conditions for granting authorization for a new establishment shall not duplicate requirements and controls, which are equivalent or essentially comparable as regards their purpose to those to which the provider is already, subject.⁵² This is a less stringent provision than the provision on authorization in the DSUP, which simply states that the registration of an SUP shall not be conditional on obtaining any license or authorization.⁵³ In the Memo of the European Commission on the Services Directive with Questions & Answers the following is stated:

Member States asking a service provider to submit a document in the context of an administrative procedure must accept any document submitted by a service provider and issued by another Member State which serves an equivalent purpose. The

original or a certified copy/translation, in principle, cannot not be required.⁵⁴

This is a comparable provision as the acceptance and recognition of identification documents in the DSUP. However, it is not clear on which provision in the Services Directives this statement is based. Moreover, the Services Directive itself does not put the Member States under the obligation to accept and recognize identification issued by another Member State or under its authority. In a 2012 study, it appeared that many relevant administrative procedures for service providers were not yet online and possibilities for cross-border completion of procedures were very limited.⁵⁵ The cross-border completion was mainly possible in Member States who do not require advanced e-identification or electronic signatures. Main problems with online completion exist in Member States which require electronic identification and electronic signatures but do not technically support these from other Member States, and this number remains relatively high with one-third or even more. None of the PSCs allows the completion of procedures from all other Member States but at best from a limited number of Member States.⁵⁶ At the same time, the study stated that there were signs of progress in a number of Member States and clear plans in others to have the necessary technical solutions in place by 2014. One of the key issues is the mutual recognition of cross-border authentication means because it is difficult to determine with a satisfactory degree of certainty that the provided information is indeed correct. In order to be able to recognize foreign authentication means, one must first be able to ascertain its reliability. In the absence of a cross-border authentication policy that allows a Member State to determine the security level of a specific authentication means, the Member State has no other possibility than to verify the specific qualities of the authentication means on a case-by-case basis.⁵⁷ Any cross-border authentication solution should as a minimum show how the Member State can determine the reliability level of a foreign authentication mechanism being used. Some argue that there is a compelling legal imperative to develop a pan-European eID

48 Commission Decision of 16 Oct. 2009 setting out measures facilitating the use of procedures by electronic means through the ‘points of single contact’ under Directive 2006/123/EC of the European Parliament and of the Council on services in the internal market, 2009/767/EC, OJ L 299/18 and Directive 1999/93/EC of the European Parliament and of the Council on a Community framework for electronic signatures, OJ L 13/12.

49 Commission Decision of 25 Feb. 2011 establishing minimum requirements for the cross-border processing of documents signed electronically by competent authorities under Directive 2006/123/EC of the European Parliament and of the Council on services in the internal market, 2011/130/EU, OJ L 53/1.

50 Article 5 para. 1(a) of the e-Signature Directive requires Member States to ensure that an Advanced Electronic Signature, which is based upon a qualified certificate and is created by a secure signature-creation device, satisfies the legal requirements of a signature in relation to data in electronic form in the same manner as a handwritten signature. Such signatures are commonly referred to as Qualified Signatures although this term is not used in the Directive.

51 Article 9 para. 1 Services Directive.

52 Article 10 para. 3 Services Directive.

53 Article 14 para. 6 DSUP.

54 Question 12: http://ec.europa.eu/internal_market/services/services-dir/faq/index_en.htm.

55 European Commission (2012), ‘Commission Staff Working Document; Detailed information on the implementation of Directive 2006/123/EC on services in the Internal Market accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the implementation of the Services Directive. A partnership for new growth in services 2012-2015’, SWD(2012)148 final, p. 21.

56 European Commission (2012), *supra* n. 55, p. 20.

57 IDABC (2009), ‘Study on eID Interoperability for PEGS: Update of Country Profiles: Analysis and assessment report (D2.1 Report on analysis and assessment of similarities and differences; D2.2. Report on impact on eID interoperability’, p. 134: <http://ec.europa.eu/idabc/en/document/6484>.

framework because several single market initiatives and legal frameworks presuppose and rely on cross-border interactions between administrations, businesses and citizens across Europe. As a result they argue that in the absence of a functioning pan-European eID framework, it is impossible to fully comply with existing legislation with reference to Article 8 of the Services Directive.⁵⁸ Before I will discuss how a new Regulation partly deals with this problem, I will analyse the obligation of identification recognition and acceptance under the DSUP in greater extent.

3.1.3. DSUP and Identification

The DSUP distinguishes identification that is issued electronically as a type of identification that is part of the broader category of 'identification'.⁵⁹ It is not clear whether 'identification issued electronically' is the same as 'electronic identification'. Both are not defined nor described by the DSUP. Electronic identification has been defined in the eIDAS Regulation⁶⁰ and means the process of using person identification data in electronic form uniquely representing either a natural or legal person, or a natural person representing a legal person.⁶¹ In case of an entirely online registration in combination with an identification requirement of the Member State of registration, there may be electronic identification as defined by the eIDAS. In case of a paper registration of the SUP or an electronic registration using electronic copies of identity documents, there may not be an electronic identification but recognition and acceptance of the identification of the founder may still be needed under the DSUP.⁶² In both cases, the DSUP does not give us much information about what this recognition entails, what rules will apply, for instance whether certain assurance levels of the identification should be used by the Member States and whether there is a difference between the two identification methods (electronic and paper) and the recognition and acceptance thereof. Does the acceptance and recognition of identification also include

authentication means? Should the authentication means satisfy certain conditions? The DSUP states that the recognition and acceptance shall take place '*for the purposes of the verification by the Member State of registration*'. Are there any obligations of the other Member State to facilitate this verification? These uncertainties are relevant in light of several initiatives of the European Commission that deal with electronic identification, authentication and interconnectivity of the national registers⁶³ such as the eIDAS, IMI and the proposed ACPD Regulations.⁶⁴ First, I will discuss the eIDAS in relation to the electronic identification and verification.⁶⁵ Second, I will address the ACPD Regulations in relation to the paper registration.

3.1.4. eIDAS Regulation

The DSUP has been proposed before the adoption of the eIDAS regulation on 24 July 2014, which is part of the ICT and e-Government European Action Plan 2011–2015. The eIDAS Regulation lays down the conditions under which Member States should recognize electronic identification means (EIM)⁶⁶ of natural and legal persons falling under a notified electronic identification scheme (EIS)⁶⁷ of another state.⁶⁸ One of the objectives of this Regulation is to remove existing barriers to the cross-border use of EIM used in the Member States to authenticate, for at least public services. The eIDAS provides that when an electronic identification using an EIM and authentication⁶⁹ is required under national law or by administrative practice to access a service provided by a public sector body online in one Member State, the EIM issued in another Member State shall be recognized in the first Member State for the purposes of cross-border authentication for that service online, provided that certain conditions are met. Before these conditions are discussed, it is important to know that the eIDAS identifies certain assurance levels associated with an EIS. These assurance levels (low, substantial and high) relate to the degree of confidence in the claimed or asserted identity of a

58 Noberto Nuno Gomes de Andrade et al., *Electronic Identity* 9 (Springer 2014).

59 Article 14 para. 5 DSUP.

60 Regulation (EU) No. 910/2014, *supra* n. 34. The eIDAS Regulation has been in force since 17 Sep. 2014, but will be applied from July 2016.

61 Article 3 sub 1 eIDAS Regulation.

62 Article 14 para. 5 DSUP.

63 Business registers are organized at national (e.g., Sweden, Ireland and Denmark), regional (e.g., Austria) or local level (e.g., Germany).

64 The proposed ACPD Regulation: European Commission (2013), 'Proposal for a Regulation of the European Parliament and of the Council on promoting the free movement of citizens and business by simplifying the acceptance of certain public documents in the European Union and amending the IMI Regulation COM(2013)228 final.

65 This plan is developed in view of the development of more sophisticated approaches to identification and authentication by Member States. This entails the use of electronic identification and authentication in the online environment and aims at cross-border recognition. One example of the EU is the STORK project. The aim of the STORK project is to establish a European eID Interoperability Platform that will allow citizens to establish new e-relations across borders, just by presenting their national eID. The website of the STORK project tells us that in the future, you should be able to start a company, get your tax refund, or obtain your university papers without physical presence. All you will need to access these services is to enter your personal data using your national eID, and the STORK platform will obtain the required guarantee (authentication) from your government. <https://www.eid-stork.eu/>.

66 EIM means a material and/or immaterial unit containing person identification data and which is used for authentication for an online service (Art. 3 sub 2 eIDAS Regulation).

67 EIS means a system for electronic identification under which electronic identification means are issued to natural or legal persons representing legal persons (Art. 3 sub 4 eIDAS Regulation).

68 Article 1 eIDAS Regulation. Other subject matters are: eIDAS lays down rules for trust services, in particular for electronic transactions and established a legal framework for electronic signatures, electronic seals, electronic time stamps, electronic documents, electronic registered delivery services and certificate services for website authentication.

69 Authentication means an electronic process that enables the electronic identification of a natural or legal person, or the origin and integrity of data in electronic form to be confirmed (Art. 3 sub 5 eIDAS Regulation).

person, and the reliability and quality of the technical specifications, and standards and procedures attached to the EIS.⁷⁰ The European Commission will set out minimum technical specifications, standards and procedures with reference to the assurance levels by 18 September 2015.⁷¹ A Member State is obliged to recognize an EIM when:

- (1) the EIM is issued under an EIS that is included in a specific list published by the Commission. In order to be included in this list, Member States should notify the Commission of the EIS including its assurance levels and the issuer or issuers of the electronic identification means under the schemes and provided information on the applicable supervisory regime, responsible authorities and entities that manage the registration and arrangements for suspension or revocation. The EIS shall be eligible for notification when certain requirements are met for example, the notifying Member State ensures the availability of authentication online, so that any relying party established in the territory of another Member State is able to confirm the person identification data received in electronic form;⁷²
- (2) the assurance level of the EIM corresponds to an assurance level equal to or higher than the assurance level required by the relevant public sector body to access that service online in the first Member State, provided that the assurance level of that EIM corresponds to the assurance level substantial or high;
- (3) the relevant public sector body uses the assurance level substantial or high in relation to accessing that service online.

Consequently, the obligation of recognition of electronic identification only exists when certain conditions regarding the quality and reliability of the EIM are met and authentication is possible. The risk of a forced recognition and acceptance of unreliable or questionable identification of other Member States is mitigated under the eIDAS due to the required assurance levels. However, an EIM which is issued under an EIS included in the list published by the European Commission and which corresponds to the assurance level low *may* be recognized by public sector bodies for the purpose of cross-border authentication for the service provided online by those bodies. In that case, it is a choice of the Member State itself whether or not to accept the low assurance level. After the adoption of relevant implementing acts (expected by mid-2015), Member States may voluntarily recognize notified

electronic identification of the other Member States. The mandatory mutual recognition of eIDs will apply from mid-2018.⁷³

3.1.5. *eIDAS Regulation en DSUP*

The question arises whether it would be comprehensible that the rules of the eIDAS Regulation would also apply to the SUP registration. If the rules of the eIDAS Regulation would have to be used for the acceptance and recognition of electronic identification of Article 14 of the DSUP, it would give Member States some sort of guarantee that the identification is trustworthy because of the assurance levels and the conditions that are attached to the eligibility of notification of an EIS. If the eIDAS Regulation would apply a problem may arise for the DSUP, because Member States are not obliged to notify their EIS to the European Commission under the eIDAS Regulation.⁷⁴ What rules will be applicable in case some Member States have not notified the European Commission? Under the eIDAS, the Member State of registration is not under the obligation of accepting and recognizing the EIM of the other Member State when the EIS to which the EIM belongs, is not part of the list published by the European Commission. This would mean that (legal) persons that – for their identification – are dependent on the Member State of which the relevant EIS is not part of the published list, may not be able to set up an SUP in Member States of registration that refuse to accept the identification. This would then be an exception to Article 14 DSUP as the provision currently stands. A connected question is what will happen when a Member State does have a notified EIS but which does not have an assurance level equal to or higher than the required assurance level of the Member State of registration, which should be substantial or high? In that situation, we would probably have a similar outcome, namely an inability to establish an SUP in the Member State of registration. Even though this may be undesirable from the point of view of the European Commission, in my opinion it would be the responsibility of the Member States to create an EIS that does have the appropriate assurance level. With regards to the eIDAS, the European Commission has underlined that it does not have the right to legislate on the management of electronic identities.⁷⁵ This is a matter of national sovereignty. It is up to Member States to decide whether to have such a form of identification, when it is required, and what technology to use. The eIDAS Regulation aims only to ensure that where these electronic identifications exist, they can be used across

⁷⁰ Article 8 eIDAS Regulation.

⁷¹ Article 8 para. 3 eIDAS Regulation.

⁷² For instance (see Art. 7 of the eIDAS Regulation): the electronic identification means are issued by the notifying Member State, under its mandate or independently of the notifying Member State but recognized by it and the electronic identification scheme and the electronic identification means issued thereunder meet the requirements of at least one of the assurance levels set out in the implementing act referred to in Art. 8(3) of the eIDAS Regulation.

⁷³ European Commission (2014), 'Electronic identification and trust services: Questions & Answers', Memo/14/586, p. 2: http://europa.eu/rapid/press-release_MEMO-14-586_en.htm.

⁷⁴ Recital 13 eIDAS Regulation.

⁷⁵ European Commission (2012), 'Electronic identification, signatures and trust services: Questions & Answers', Memo/12/403, p. 4: http://europa.eu/rapid/press-release_MEMO-12-403_en.htm?locale=en#euContent.

borders fully respecting privacy and data protection rules. It does not set European standards for security, supervision or enrolment for electronic identification. However, the lack of suitable EISs of a certain Member State for cross-border identification and authentication should perhaps be seen as an obstacle for the freedom of establishment because it would make it more difficult for its residents to establish an SUP across the border. Although, the European Commission assures that the eIDAS Regulation does not put Member States under the obligation of creating and offering electronic identification because it would not have the power to do so, under the DSUP every Member State is obliged to offer the possibility of online registration. It therefore puts Member States in a difficult situation by requiring cooperation between Member States without having in place an adequate trustworthy context relating to recognition and acceptance obligations (yet). The European Commission should clarify the relation between the DSUP and the eIDAS and if the rules of eIDAS would not be applicable to the registration of an SUP, the Commission should explain why and on which grounds the DSUP acceptance and recognition of identification would deviate.

3.1.6. *Proposed ACPD Regulation*

In the previous paragraph, I have discussed the electronic identification and registration. Under the DSUP, Member States are free to offer a paper registration as an additional procedure. The question comes up how the rules on recognition and acceptance of EIMs relate to those of the 'paper' identifications? In 2013, a proposal for a Regulation on promoting the free movement of citizens and business by simplifying the acceptance of certain public documents in the EU and amending the IMI Regulation (ACPD Regulation) has been published by the European Commission.⁷⁶ It concerns public documents issued by authorities of the Member States and having formal evidentiary value relating to birth, death, name, marriage, registered partnership, parenthood, adoption, residence, citizenship, nationality, real estate, legal status and representation of a company or other undertaking, intellectual property rights and absence of a criminal record.⁷⁷ The authentication of public documents between the Member States is governed by various international conventions and agreements.⁷⁸ Those conventions and agreements predate the establishment of administrative and judicial cooperation at Union level, including the adoption of sectorial Union law instruments addressing the issue of cross-border acceptance of specific public documents. The

proposal is streamlining the rules and procedures applied currently between the Member States concerning the verification of authenticity of certain public documents.⁷⁹ When Member States, for instance, have doubts about the authenticity of the public documents, the authorities can either seek information from the relevant authority or insist that the original or a certified copy be produced.⁸⁰ Member States have up to a month for replying to this request. If the reply of the authorities to the requests for information does not confirm the authenticity of the public document or of its certified copy, the requesting authority shall not be obliged to accept them.⁸¹

3.1.7. *Proposed ACPD Regulation and DSUP*

The EU documents relating to the DSUP do not – as far as I know – refer to this proposal. It could be relevant for the 'paper registration' of the SUP, but it does not consider an assurance level regarding the content of the identification document. Member States would still have the opportunity to contact the other Member State in case of doubt and request additional information. There should be no difference between the risk related to the obligation of acceptance and recognition of identification in case of electronic identification and of paper identification. The DSUP should be clearer on these issues.

3.1.8. *Other Observations*

Other observations concerning the DSUP related to the registration of an SUP are first that Article 14 paragraph 5 DSUP provides that 'any identification issued in another Member State' should be accepted and recognized. It does not limit it to the Member State that has the actual authority to issue the identification. Moreover, Article 14 DSUP only refers to the founding member and any other person making the registration on the member's behalf. It does not refer to the persons who are authorized to represent the SUP in dealings with third parties and in legal proceedings. Does this mean that for those persons the identification issued in another Member State should not automatically be recognized and accepted by the registration Member State? In addition, Member States are allowed to require registration in an official language of the Member State concerned. As a consequence, a translator or legal adviser may have to be used in order to fill in the online registration forms in case of a cross-border establishment. This will also cause a rise of costs, which is contrary to the objective of the DSUP.

⁷⁶ European Commission (2013), 'Proposal for a Regulation of the European Parliament and of the Council on promoting the free movement of citizens and business by simplifying the acceptance of certain public documents in the European Union and amending the IMI Regulation COM(2013)228 final.

⁷⁷ Article 3 para. 1 ACPD Regulation.

⁷⁸ Recital 4 ACPD Regulation.

⁷⁹ And at the same time complementing the existing sectorial Union law, including rules relating to the circulation of specific public documents, by abolishing the requirements of legalisation, Apostille and simplifying the use of copies and translations. European Commission (2013), *supra* n. 76, p. 5.

⁸⁰ Article 7 para. 1 ACPD Regulation.

⁸¹ Article 7 para. 6 ACPD Regulation.

3.1.9. Registration, Legal Personality and Establishment

There are a few events concerning the registration that are important: (1) Member States shall issue a certificate of registration confirming that the registration procedure has been completed, no later than three days from the receipt of all required documentation by the competent (registration) authority.⁸² (2) The DSUP provides that the registration of the SUP, all documents provided during the process of registration (and subsequent changes to them), shall be disclosed in the relevant register of companies immediately after registration. (3) The SUP shall acquire full legal personality on the date on which it is entered in the register of companies of the Member State of registration.⁸³ (4) The consideration for the share shall be fully paid up at the moment of registration of an SUP.⁸⁴

It is not clear whether the act of disclosure of the registration documents is similar to the act of entry of the SUP in the register. It is also not completely clear whether the issuance of the registration certificate should be seen as the 'registration' after which the documents must immediately be disclosed. This makes it difficult to determine when the legal entity would be formed. When disclosure and entry are not the same, than it is questionable why the registration documents would be disclosed immediately after registration. More importantly, when the moment of the issuance of the certificate is not the same as the moment of the entry of the SUP in the register of companies, would the SUP already exist but without legal personality? If so, the question arises which rules will govern the SUP until the legal personality is acquired? Furthermore, is it possible to act on behalf of an 'SUP to be established', for example between the moment of filing for registration and the moment the certificate is issued? How does this relate to certain national rules regarding this period? In case of online registration, the consideration shall be paid into the bank account of the SUP.⁸⁵ Would there already be a bank account for an SUP that has not yet been established? Furthermore, what happens when there are defects in the registration and establishment procedure? What rules will apply? If reference would be made to national law this would complicate the easy and transparent set-up of an SUP across the EU, which is contrary to the objective of the DSUP.

3.1.10. Seat of the SUP

An SUP shall have its registered office and either its central administration or its principal place of business in the Union.⁸⁶ To enable businesses to enjoy the full benefits of the internal market, DSUP states that Member States should not require the registered office of an SUP and its central administration to be in the same Member State.⁸⁷ An SUP shall be registered in the Member State in which it is to have its registered office⁸⁸ and shall be governed by the national law of the Member State where the SUP is registered.⁸⁹ Some parties argued for the possibility to oblige SUPs to have their central administration and their registered offices in the same Member State.⁹⁰ For example, the EESC believes that an SUP should not be registered in a place where it carries out no business activities whatsoever (letter boxes).⁹¹ It states that in conjunction with the provision that SUPs are subject to the law of the state in which they are registered, it could jeopardize employees' participation rights, but also enable circumvention of national tax law. This was a contentious issue in the SPE process.⁹² This discussion may be opened again in relation to the SUP.

3.2. Formation by Conversion

As mentioned, there are two methods of formation of an SUP. Next to the formation *ex nihilo*, the DSUP provides for formation by conversion. An SUP can be formed by conversion of an existing company, which is listed in Annex 1. The explanatory memorandum states that the DSUP refers to national law with regard to conversion procedures. Nevertheless, this referral is not included in the DSUP explicitly. The DSUP does, however, provide for three criteria in order to convert a company in an SUP. These are: (1) a resolution of its shareholders is passed or a decision of its single-member is taken authorizing the conversion of the company into an SUP, (2) its articles of association comply with the applicable national law, and (3) its net assets are at least equivalent to the amount of its subscribed share capital plus those reserves which may not be distributed according to its articles of association. It is relevant to know whether, and if so to what extent, national law is applicable in case of a conversion in light of the registration procedure. For example, paragraph 6 of Article 14 DSUP affirms that Member States shall not make the registration

⁸² Article 14 para. 4 DSUP.

⁸³ Article 14 para. 2 DSUP and Art. 7 para. 1 DSUP.

⁸⁴ Article 17 para. 1 DSUP.

⁸⁵ Article 17 para. 2 DSUP.

⁸⁶ Article 10 SUP.

⁸⁷ Recital 12 DSUP.

⁸⁸ Article 14 para. 1 DSUP.

⁸⁹ Article 7 para. 4 DSUP.

⁹⁰ Syndicat Europeen Trade Union (2014), 'ETUC position on single-member private limited liability companies', 11 Jun. 2014: <http://www.etuc.org/documents/etuc-position-single-member-private-limited-liability-companies#.VFfQXOdWLnw>.

⁹¹ European Economic and Social Committee (2014), 'Opinion of the European Economic and Social Committee on the Proposal for a Directive of the Parliament and of the Council on single-member private limited liability companies', INT/744, 13222/14 DGG 3 B, LM/vp, p. 3.

⁹² It was proposed to implement a transitional period of two years as from the application of the SPE Regulation during which the SPE would be obliged to have the real seat and the statutory seat in the same Member State and after that period national law would apply. Council of the European Union (2009), 'Proposal for a Regulation on a European private company = Political agreement (Public deliberation, pursuant to Article 7 CRP', 16115/09 DRS 71 SOC 711, p. 2.

of an SUP conditional on obtaining any license or authorization. This provision is not explicitly solely directed to newly incorporated SUPs as is done in paragraph 3 of Article 14 DSUP. In certain Member States, the national conversion procedure requires a notarized authorization for completion of the conversion and is as a consequence required for registration of the SUP according to national rules. The question thus arises to what extent the registration requirements included in the DSUP are relevant for the conversion procedure.

It is also not clear whether a cross-border conversion is allowed under the DSUP as Article 9 paragraph 1 DSUP only tells us that *'Member States shall ensure that an SUP may be formed by the conversion of the types of companies listed in Annex 1'*. A literal interpretation would be that any company listed in Annex 1 could be converted to an SUP in a certain Member State. European law has so far not yet regulated transferring the registered seat to another Member State and thereby converting into another legal form. Following the case law of the European Court of Justice such a conversion should be allowed by the Member State of origin and the host Member State as a result of the freedom of establishment according to Articles 49 and 54 of the Treaty on the Functioning of the European Union (TFEU) when the host Member State provide for such a domestic conversion.⁹³ The host Member State is allowed to determine which legal provisions apply to cross-border conversions as long as the principles of equivalence and effectiveness are observed. A cross-border conversion would therefore follow a national cross-border conversion procedure.

3.3. Trust and the SUP

The introduction of an SUP should create trust in foreign legal entities that have the abbreviation 'SUP' in their name across Europe.⁹⁴ The abbreviation SUP would stand for an assurance that the legal entity would be tied to clear harmonized rules equal in all Member States.⁹⁵ The DSUP would provide for a standard template of the articles of association, which would be identical across the EU and available in all languages of the Member States. However the use of the template of the articles of association is only required when the SUP is registered online. If a paper registration is used – when provided for by the Member State of registration – the template does not have to be used.⁹⁶ In addition, after registration the SUP may amend its articles of association.⁹⁷

This will not provide assertion that there is a transparent and well-understood set of rules applicable to the SUP. If differences in the level of trustworthiness of the identification procedures would continue to exist, it would be difficult to create trust in the SUP. In the situation that rules similar to the eIDAS Regulation rules would apply, Member States would not be obliged to accept and recognize EIMs that are part of an EIS which is not a part of the published list or has a insufficient assurance level. However, because a cross-border aspect is not compulsory, SUPs may be established in a Member State with low-level identification procedures. Therefore, it may be a good idea to add a customary indication of the country of registration to the SUP abbreviation and publish the names of the Member States that have a sound identification procedure with adequate assurance levels.⁹⁸

4. CONCLUSION

The SUP is proposed for the benefit of a quicker and cheaper way of establishing a single-member private limited liability company across the border. In order to achieve this objective, a mandatory full electronic registration procedure is included in the DSUP. Member States still have the possibility to provide for an additional paper registration procedure. Although Member States are bound by certain conditions, they have some freedom in designing the (online) registration process and the requested information. As a result twenty-eight different registration procedures may come into force. Because of the mandatory recognition and acceptance of foreign identification, a risk of untrustworthy identification issued in another Member State would exist, possibly leading to all different kind of problems. European law does not provide for a full legal and operational framework to facilitate this mandatory full electronic registration in combination with the acceptance and recognition of foreign identification (yet). The European Commission should clarify how the DSUP relates to other EU initiatives and regulation in this area such as the eIDAS Regulation. The implementation of the Services Directives shows that there is still work to do. Even though it would be of great value to have available a possibility of establishing an SUP in a simplified way, it would be of greater importance to first have the right infrastructure and reliability of national systems in place.

⁹³ Cartesio C-210/06 and Vale C-378/10.

⁹⁴ European Commission (2014), *supra* n. 7, p. 63.

⁹⁵ However, harmonization is limited and the level of harmonisation is not equal for all the related matters. Various references to national law do not benefit the aim of creating 'similar' SUPs that are registered in different Member States. Parlament Republik Österreich (2014), *supra* n. 24, p. 3.

⁹⁶ Article 11 para. 1 and 2 DSUP.

⁹⁷ Article 12 para. 1 DSUP.

⁹⁸ See also: H.J. de Kluiver, (*Re*)considering the SPE, 5 European Co. L. 112–113 (2008).