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A SINGLE MEMBER COMPANY- CONVENIENT OR NOT FOR THE FOUNDERS

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Abstract. *The Twelfth Directive is one of the 'Third Generation Directives'. The first Directive goal is to achieve a high level of harmonization and guarantee the right of freedom of companies' establishment. The main task of the Directive could be creating a legal instrument which allows the limitation of liability of the individual entrepreneur in all member states in the same way. Also, the Directive should get rid of the differences among member states laws and highlight all the advantages, particularly regarding the competition status among the other company forms.*

INTRODUCTION

The Treaty of Rome granted the right of establishment to companies formed in accordance with the law of a Member State and having their registered office within the Community. It means in practice that:

- companies are mutually recognized in all Member States;
- companies of one Member State, which establish themselves in another Member State, cannot be required to comply with the formalities other than those laid down for domestic companies.

The Treaty also required national laws to be harmonized. The specified instruments should be used for the purpose. That harmonization had a task to limit the risks resulting from wide discrepancies among Member States' rules as regards the protection of shareholders, creditors and third parties in general.[1] The beginning of the modern company law was in the 19th century when we can find these forms incorporated by registration under the Acts. It was the result of fusion of two different legal principles. A registered company, that is, a legal person (statutory or charted company) is a 'corporation'. On the other hand, there are natural persons who are its members.[2]

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[1] El-Agraa, Ali M. 2001. *The European Union: Economics&Policies*, Harlow: Financial Times, Prentice Hall, p. 31

[2] Charlesworth and Morse. 1999. *Company Law*. London: Sweet&Maxwell, p. 4

The position of the company, corporation and, particular partnership are different regarding the state. Term 'company' implies an association of a number of people for some common object or objects.[3] In everyday communication this term normally means 'association for economic purposes'. In English law there are two main types of organization for doing the business: company and partnership.[4] A different situation is in continental law, again depending on national law. The problem is how the minimum of similarity could be achieved regarding the legal status, owners' rights and the other important questions.

After establishing EC (later EU) there are so many attempts for harmonization especially the company law. One can say that modern company law is finally taking shape. Obviously, the results are still modest.

2. THE GOALS OF SETTING UP A SINGLE-MEMBER COMPANY

The basic goal is that the European company should become our reality. A step forward has been made, with discussions focusing on comparisons between a 'European' model and the different national models, on one side, and on the other hand, the search for a flexible formula that would leave the essential features of the different national systems intact.

In May 2001 the Commission adopted a recommendation on the recognition, measurement and disclosure of environmental issues in the annual accounts and annual reports of companies. This recommendation clarifies the accounting rules applicable and indicates how to improve the quality, transparency and comparability of environmental data in annual company accounts and reports. The recommendation helps and encourages companies to improve the environmental information made available to regulating authorities, investors, financial analysts and the general public. It is applicable to the accounting directives on certain forms of company (fourth and seventh directives), banks and insurance companies. It also takes into account the provisions requiring companies quoted on the stock exchange to apply the international accounting standards (IAS) as of 2005.

In December 1989 the Council adopted the Twelfth Company Law Directive in order to introduce a single-member company throughout the Community.[5] As the main task of the Directive could be defined creating a legal instrument which allows the limitation of liability of the individual entrepreneur in all the member states at the same way. The Directive should achieve a high level of harmonization.

Before adoption the Directive, the legal position was that certain member states allowed single-member companies to be formed. On the other hand, most other states maintained the requirement that there should be more than one member. One of requirements is that, if all shares came to be held by a single shareholder, there should be the

[3] Davies, P. 2003. *Gower and Davies' Principles of Modern Company Law*. London: Sweet&Maxwell, p. 3
[4] Davies, P. 2003. Gower and Davies' Principles of Modern Company Law. London: Sweet&Maxwell, p. 3
[5] Twelfth Council Company Law Directive 89/667/EEC of 21 December 1989 on single-member private limited-liability companies Official Journal L 395, 30/12/1989 p. 0040 – 0042; deadline for implementation of the legislation in the member states was 01.01.1992

winding up of the company or the personal liability of the sole member. The reason of their thinking is the concept of a company as a contract between at least two people.[6]

The EC's law harmonization program formulates requirements to which the national legal systems of the member states have to be adjusted on a continual basis. EC law (or EU law) is not static one, but it is developing dynamically. The Twelfth Company Law Directive should provide the same condition for a single-member company in all EU countries. After more than 10 years of the practice it could be said that the Twelfth Directive did not justify numerous expectations. In a lot of states there are national solutions for establishing a single-member company, which are not the same as the Directive's rules. On the other hand, the Directive offers too much discretion.

Actually, after the Solomon case, there has been a very long period of time spent on trying to generalize the possibility for setting-up a single-member company. For example, Germany adopted the Act on Limited Liability Companies 1892, last amended in 1989 (including a single-member company), in France the Law of 1985 introduced this kind of company, Belgium in 1987, Denmark in 1973, i.e.[7]

What was the legislator's idea and how were the main objectives defined? Regarding the experience based on the Solomon case, **the first goal was to limit the only one owner's liability.** Or, maybe it is better to say to define whether he always bears losses only to the extent of his contributions, or every exception should be also defined. It is completely clear that a single-member company is needed in all market economies. It could be very dangerous, especially for creditors, when all shares are in the hands of one founder. Depending on the state, one member has a limited liability regulated in a different way. The shareholder has to either pay in all the share capital of the company or must pay the minimum required and provide security for the remaining amount in some of them (in Germany). In France (as in a lot of another countries), if only one shareholder is an individual, he may not be the sole shareholder of another limited liability company. Also, if only one member is a legal entity, still, it may not be a limited liability company that has only one shareholder. The possibility for a legal entity to have only one shareholder is a dramatic departure from traditional concepts of the French company law.[8] It could be also noted that only one other type of French legal entity *exploitation agricole a responsabilite limitee* may have only one shareholder. But, one member has to have limited liability upon incorporation as well as if this arises later, as the result of a concentration of all shares in his own hands. Thus, the most important fact should be to define the position when the owner (founder) has to have unlimited liability.

The meaning of the single-member company is explained in the Commission report: 'Promoting the access of individual entrepreneurs to the status of company represents the best framework for business development in the internal market'.[9] According to the Commission, 92, 4% of all enterprises in the EU are so-called 'micro-enterprises' employing fewer than ten people and this category makes a greater contribution to employment than

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[6] The French Civil Code Art. 1832

[7] Germany Act on Limited Liability Companies, April 1892 (Legal Gazette 477), last amended in May 1989 (Federal Law Gazette I 721); The Law of 14 July 1987 modified Art. 1832 of the Belgian Civil Code; Italian Decree 88 of 3.3.1993; French Law 66-537, Decree 67-236 and Law 94-126 of 11.2.1994.

[8] Behrenes, P. 2001. *Limited Liability Companies*. Budapest: CEU, p.85

[9] COM 101 Final 1988:3

does large business. Single-member companies usually belong to small and medium sized enterprises. These enterprises in the EU generate 2/3 of the turnover of all the companies put together.[10]

The second goal of setting up a single-member company is to provide and guarantee the right of freedom of companies' establishment. Also, the Directive should get rid of differences between member states laws and highlight all advantages, particularly regarding competition status among the other company forms.

Finally, **the third goal** explains Power in the best way: 'The Directive allows the genuine individual entrepreneur to limit his liability but it must not be used as a weapon of fraud: it should be a shield and not a sword'.[11] It means that to **separate the assets of founder and company** maintains the protection of creditors and the other single-member company's partners.

3. ANALYSIS OF THE TWELFTH DIRECTIVE

3.1. The Founder of a Single Member Company – A Natural or Legal Person

There are so many commentaries about liability of the natural and legal person who is the sole member, especially, if this sole member wants to be the sole member of several companies, as well as those about the position the legal person can take regarding groups of companies. The *Article 2* defines a possible solution, but there are different provisions under the national laws. The question is: should the status of natural and legal persons be determined in a different way or not, and why? First, it is necessary to explain the Directive's provision regarding some of solutions in national laws, and finally, to make some suggestions concerning the previous cases.

The Directive (Art 2(2)) emphasizes that member states are to be permitted in specific cases to impose restrictions on the use of single-member companies and the limited liability of the sole member. This meaning is defined in the Directive's Recitals No. 5, particularly in the Explanatory Memoranda and Commission Proposals. The member states are able to lay down special provisions, including sanctions to cover the eventual risk element.

The member states have a different approach to this problem. Depending on it, the natural and legal persons have different position and obligations. In Germany one or more persons may form companies with limited liability for any lawful purpose. There is no limit to the number of founders or eventual shareholders. The Act permits the formation of single-member and the founder may be a natural or legal person. Under this act the company with limited liability has its own rights and obligations. A very important fact for company's legal status is that only its assets are accountable for the liabilities of the company to the creditors. It means that in Germany there is no restriction for a natural person-founder of the single-member company to have this status in another single-member company.

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[10] White Paper, COM (94) 207 Final and COM (93) 700 Final

[11] Power, V. 1990. *Twelfth European Company Directive.* I.C.C.L.R., p.45

In Italy and Belgium the natural person who is the founder of a single-member company has unlimited liability for the company's debts. This is the reason why in these countries the natural person cannot be a single member of more than one single-member company.[12] Under the basic text of the French law on Commercial Companies a natural person might be the sole associate of only one limited liability company. This provision was amended, and nowadays a natural person may be the sole member of several limited liability companies. But, on the other hand, a limited liability company may not have as a sole associate another limited liability company formed by one person. However, this French legislator's step presents something new in the legal reform and a very important chance for companies.

What about the liability of the legal person regarding the problem of groups of companies? What is the solution for that problem under the Directive (Article 2(2) (b))? There are two groups of countries within the member states: the first one is a group which allows groups of single-member companies, and the second does not allow groups of single-member companies. Germany (in addition to Denmark and Netherlands) allows the situation in which a legal person as controlling company could be the sole member of another single-member company (controlled company). The question is the level of protection of the creditors. In other words, the issue is whether the national laws' more extensive protection of creditors is in conformity under the Directive or whether it frustrates the limitation liability of single-member companies. One should keep in mind the decisions of the Federal Court of Justice in Civil Cases (BGH). After a long period of practice three level liabilities under article 2(2) (b) were suggested in Germany:

1) compensation for loss suffered by the subsidiary
2) liability based on detrimental and lasting mismanagement
3) liability of the parent company for individually damaging measures.

One of the basic cases was *Video* when the Court decided about the liability of a single-member company that owned several other companies including other single-member companies.[13] It was a period after adopting the Directive, i.e. it had been in force. The Court applied the Germany case law and found that the sole owner (owner of a limited liability group) was liable if three conditions were satisfied. But, the main problem was whether the German case law was contrary to Art. 2(2) of the Directive. That question had met with academic criticism.[14] Obviously, the German case law on groups should have been interpreted in conformity with the Directive even prior this case, that is, even prior to 1992.

The second case that is important to this problem could be *TBB (Thomas-Baubetreuunsgsellschaft)* in 1993. The BGH after this case made the conditions for the liability in the groups:

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[12] Italian case see: Cova, B., 1993 Italy: Companies Directive Implemented, I.F.L.R., p.45; Belgium L'enterprise Unipersonnelle a Responsabilite Limitee, 1985

[13] NJW 1991:3142 (BGH 23.9.91, BGHZ 115,187)

[14] Wilhelm, U., 1993, Haftung im Qualifiziert-Faktischen und Europarecht. p.732; Kindler, P., 1993, Gemeinschaftsrechtliche Grenzen der Konzernhaftung in der Einmann-GmbH. p.16; Horvath, E. 2003. Critical Overview of the Twelfth Directive on Single Member Companies. Bruges: College of Europe. p.18

- The sole member has to be a company. It does not matter whether the owner is a natural or legal person, but it is important that the single-member company is set up in the form of a group;
- There has to be a special closeness within the group of this kind of companies, and,
- The parent company has to influence the interests of the controlled subsidiary single-member company.[15]

Finally, the next step towards the abuse was made in 2001, in the case *Bremer Vulkan*. The Court defined and separated liability for abuse of the single-member company subsidiary.

According to the French *Code de Commerce*, Art. L. 624-5, § 3, the parent company may be charged with *de facto* director's liability if it has 'used the assets or credit of the legal person (single-member company subsidiary) to the detriment of its interests either for personal gain or in order to benefit another legal person in whom they had a direct or indirect interest'. It means that if a legal person sets up a single-member company subsidiary in France, the parent company's directors may be held to have unlimited liability to this subsidiary's creditors if management errors have led to creditors' losses. The same meaning should be applied to the single-member company. By the way, France is one of several member states that do not allow groups of single-member companies (including, Belgium and Italy, for example).

3.2. Piercing the Corporate Veil

The legal institute named '**piercing the corporate veil'** is important for single-member companies and member state no matter if they allow or not groups of single-member companies. But, the first conclusion could be that despite the necessity of piercing the veil, there is diversity among the member states regarding the status of ownership of single-member companies by a natural person and the protection of the subsidiary's creditors. After many years of applying the Directive in practice, this situation defeats the aims of harmonization and the freedom of establishing the companies. The main problem is that the Directive allows to member states to prescribe special provisions or sanctions for the situation where a natural person is the sole member of several companies, or where a single-member company as a legal person is the sole member of a company. One meaning is that harmonization has led to the greatest chaos. In fact, the Directive limits its own harmonization by giving too many alternatives.

Piercing the corporate veil has produced a lot of questions and different solutions. Should the sole member be responsible in any case or should the law define the situations of liability? Who will be responsible to creditors – the sole member or somebody else? Definitely, piercing the veil is a concept made in order to protect all creditors. But, the veil should be pierced only if there is some notion of abuse. Also, depending on the company, not only the owner should be responsible to his creditors. It means that the director (if he is a different person that the owner) and the members of director's board could bear responsibility, too.

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[15] Wilhelm, U. 1993. *Haftung im Qualifiziert-Faktischen und Europarecht*. Baden-Baden: Nomos Verlaggesellschaft, p.729

These questions could be a subject of discussion. Obviously, the next statement could be the characteristic feature of the directive: 'Disappointment must be expressed with the failure of the harmonization program to respond to the challenges of modern companies, corporate growth and the new economic order'.[16]

3.3. Liability for the Company's Duties

Obviously, the single-member company is defined as *ab initio* according the First Directive. But, what about the situation when all the shares come to be held by a single person? Unfortunately, the Twelfth Directive does not give an explicit answer. The Germany Limited Liability Companies Act states that this company as such does not exist prior to its entry into the commercial register of the domicile of the company. Whoever acts in the name of the company prior to the registration is personally and severally liable. It means that the limited liability company comes into existence as a legal entity only upon its entry in the commercial register. Before that, it is a pre-incorporation company, a company *sui generis*, but without status as a legal person. Before registration the managing directors are personally liable to the third parties. The managing directors are themselves jointly and severally liable with the pre-incorporation company to the creditors for the liabilities incurred.[17]

Under the French Law on Commercial Companies the initial managers and the associates responsible for the nullity of the company shall be jointly and severally liable to the other associates and to third parties for the damage resulting from the annulment.[18]

The Directive gives too much freedom to the member states. The result of this solution could comprise diverse consequences among the national laws. Particularly, Article 3 does not provide any exception that is defined by Article 2(2) concerning the prohibition of the personal liability of the single-member. Freedom to member states means that the member states may determine the relevant powers or delegation of the powers may be permitted. Also, the states may define very different sanctions or penalties for any failure. That could be one more impact to harmonization process within the EU law.

For example, in the German theory there are different meanings of the solution offered by Article 4. The Limited Liability Companies Act, Article 48, § 3 defines the following: 'If all shares in the company are under the control of one shareholder or one shareholder and the company besides, then the shareholder has to draw up a sign the minutes without undue delay following the passing of the resolution'. Under this article the shareholder of a single-member company is obligated to record in writing and to sign resolutions without delay once they have been passed. Some authors have mentioned that this provision leads to nullity of the decision.[19] The others offer the solution that the sole-member cannot benefit from decisions that he has not recorded in minutes or drawn up in writing.[20]

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[16] Kirkbride, J. 1993. 'European Company Law Harmonisation: A Study 1994'. I.C.C.L.R., p.283

[17] Art.11 Limited Liability Companies Act; Federal Court of Justice, BGHZ 80, pp. 129/130 decision that this provision applies to managing directors or act like managing directors; Bartl/Henkes, GmbH-Gesetz, Kommentar, Frankfurt am Main, 1980

[18] Behrenes, P. 2002. *Comparative Company Law*. Budapest: CEU, p.44

[19] Lutter, M. 1984. *Europaisches Gesellschaftsrecht*. Berlin: W de Gruyter, p.1322

[20] Baumbach and Hueck. 1970. *GmbH-Geset*. Munchen: 13th edition, p.29

According to Article 60-1 of the French Law on commercial Companies, where the limited liability company has only one shareholder, his decisions must be taken by him. He may not delegate his powers. All decisions made by only one member should be recorded in a special register that is kept at the registered office. Any action taken by the single-member in violation of the aforementioned rules may be declared void upon the petition of any interested party.

Article 5 defines that contracts between the sole member and his company as represented by him shall be recorded in minutes or drawn up in writing. But, the member states need not apply paragraph 1 to current operations concluded under normal conditions. Does anybody know how to define 'normal conditions'? And, again the Directive gives a lot of freedom to the member states regarding Article 5. Under the German Law, if all shares of the company are under the control of one shareholder or one shareholder and the company besides, and the shareholder is the company's sole managing director at the same time, the Civil Code will be applicable to his legal transactions with the company.[21] The conclusion could be that the legislator in this country allows contracts between the company and the single-member without any restriction.[22] On the other hand, this situation was defined by previous Art. 51 of the French Law on Commercial Companies in the following way: 'Under penalty of nullity of the agreement, managers and associates are prohibited from contracting, in any form whatsoever, for loans from the company, from having the company consent to overdrafts by them in a current account or otherwise, and from having the company secure or guarantee their obligations towards third parties'. According to amended Article 51 contracts between the sole member and his company must merely be recorded to register. It means that in the single-member company an agreement between the company and only one shareholder has to be acknowledged in the register which also records all the decisions made by the sole member.[23]

3.4. Form of the Single-Member Company

As already seen, a company may have a sole member when it is formed and also when all its shares come to be held by a single person (a single-member company). If someone wishes to make comparison between Article 6 and Article 2(1), the conclusion could be that the Directive allows public companies (stock corporations) to be single-member companies. But, in fact, the problem is that the member states define the private and public companies' position in a different way. That is the reason why some of the member states allow a stock corporation to be a single-member company, unlike the others. The German law provides this status to stock corporations. In this country, a stock corporation (AG) may be formed by one single founder. The first step was a German law for small public limited companies, but after that the Stock Corporation Law accepted the same formulation.[24] The legislator had in mind creditors' protection. In order to provide that

[21] Article 35 (4) of Germany Limited Liability Companies Act
[22] Burhardt, M. 1991. *The Limited Liability Company vol.II.* Munchen: Ruster edition - Business Transactions in Germany, p.23-98
[23] Dunn, E. 1990. Single-member Private Limited Liability Companies: 12th Company Law Directive, E.B.L.R., p.7
[24] BGBI I 1961, Stock Corporation Act 1976 and 1994

protection, there is the provision that the sole shareholder of a single-member public limited liability company can be made personally liable to him for negligent acts.[25]

In France, for example, the stock corporation cannot be a single-member company. In this country *Societe Anonyme* (S.A.) is the most frequently used organization, especially for large firms wishing to attract new investments. This form requires a minimum of seven shareholders.[26]

A very important fact should be the liability of the only one founder (public company) to the third parties. It is true that the member states are free to make decisions about Article 6. In practice, there is the possibility to establish a new single-member company (a public or private company to be a single-member company). Another situation is when membership of a public company falls to one member. Different situations are not in conformity with the Directive. The reference to Article 2(1) within Article 6 has to mean that stock corporations with a single member must be allowed *ab initio* as well as if it shares end up in the hands of a single member. The member states also should have in mind that the White Paper 2002 includes a draft clause to allow single-member public companies: 'a single person should be able to form both private and public companies'.[27]

But, the crucial question is who is liable for the payment of debts. The legal consequence of the Directive is that personal liability of the sole member in a private limited liability single-member company is prohibited. It should be noted that the Directive offers unclear formulation. The same definition cannot be explicitly found for both forms, that is, private and public single-member companies. A personal liability is known in some member states for the public limited liability single-member company. It could be concluded that there are so many differences within the member states, but also between the Directive's solution and national formulations.

According the Article 7, the 'member state need not allow the formation of single-member companies where its legislation provides that an individual entrepreneur may set up an undertaking the liability of which is limited to a sum devoted to a stated activity, on condition that safeguards are laid down for such undertakings which are equivalent to those imposed by this Directive or by any other Community provisions applicable to the companies referred to in Article 1'. But, this opportunity is chosen only in the Portugal law. By the way, this form is neither a company nor a legal person. One of the conditions for using the option offered by Article 7 is to impose safeguards equivalent to a single-member company. It is clear that Article 7 produces so many confusions. The result is that the option is nowhere mentioned in national laws.

4. A SINGLE-MEMBER COMPANY UNDER SERBIAN COMPANY LAW

In 1990 in Serbia (Yugoslavia in that period) the codification of commercial law started under difficult professional circumstances. The legal system had shown up contradictory trends of development despite the indisputably positive tendencies, like in all for-

[25] AktG 1994: Article 93, paragraph 5, 2.2,3

[26] Germany is followed by Denmark, Sweden, Spain, and Netherlands in harmonization process in a field of company law; on the other hand, France has a partner in Italy, for example.

[27] CM-5553, White Command paper: Modernizing Company Law –, Part II, § 6.2.

mer socialist countries. There was general confusion about defining the concept of state ownership. In Serbia there was a specific problem concerning social ownership, meaning there was no clear answer even to the simple question of who was (and still is) the subject of that kind of ownership. The result of the existing social ownership was a new way of managing companies, namely, self-management. Some authors are wrong that the only problem was that state ownership had never existed in Yugoslavia, not even at the time when the State existed. They fail to understand the differences between state and social ownership. It is the true that in practice there was 'associated labor'. Nowadays, there are state enterprises (and they existed in former Yugoslavia), but they are in the privatization process like the social enterprises, also. But some authors gave wrong facts regarding the economic situation in former Yugoslavia.[28]

According to the provisions not only of the former Enterprise Law but also of the current Company Law, it is possible to establish a single economic organization in the form of an organization with limited liability and in the form of a joint-stock company. The Serbian Company Law is to a great extent already harmonized with the main principles of EC regulations on the company law.[29] Seen from the standpoint of market economy requirements, this law satisfies necessities of legal framework usual for operating companies in market conditions. This Company Law follows the company law concepts developed in the Civil Law systems of continental Eastern Europe and in the EU as already done by the relevant legislation in other Central and Eastern European countries as well.

5. CONCLUSIONS AND SUGGESTIONS

The Twelfth Directive is one of the 'Third Generation Directives'.[30] The first goal was to achieve a high level of harmonization and guarantee the right of freedom of companies' establishment. But, the result is that there are so many differences among the national laws. In fact, the harmonization process has failed. The main reason could be too many alternatives offered by the Directive. The Directive should ensure that the legislator should make a decision about the status of a single-member company, namely, if it is a legal entity or not, and what should be the form of a single-member company? Perhaps it is possible to establish one-man company in the form of a limited liability company but also as a joint stock company. Finally, is it necessary to define unlimited liability of sole member to creditors as well as the cases in which the sole founder is considered as "unlimited-liable".

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JEDNOPERSONALNO PRIVREDNO DRUŠTVO - PREDNOST ILI NE ZA OSNIVAČE

Dragana Radenković Jocić

Dvanaesta direktiva je jedna od direktivi koje pripadaju takozvanoj "Trećoj generaciji direktiva kompanijskog prava". Prvi cilj ove Direktive je ostvarenje visokog nivoa harmonizacije i garantovanje prava osnivanja jednopersonalnog društva. Njen osnovni zadatak jeste kreiranje pravnog instrumenta koji dozvoljava ograničenu odgovornost individualnog preduzetnika, odnosno njenog osnivača, u svim državama članicama Unije na jedinstven način. Direktiva treba da reši problem razlika koje postoje medju zakonodavstvima država članica, kao i da ukaže na sve njene prednosti, posebno u pogledu konkurentskog položaja u odnosu na ostale forme kompanija.