Summary

The object of this study is the one man company. The one man company can be defined as a company whose shares are all held by a single person. There is thus only one shareholder. The study concentrates on the case of a natural person holding all the shares of a private company. It is of a comparative nature: the one man company is examined in five representative Member States of the European Union, namely: the Netherlands, Germany, France, Belgium and the United Kingdom (of which only the English law is dealt with).

The one man company is an interesting phenomenon, since company law was originally developed for companies with more than one shareholder. The company is typically set up as an association of several shareholders. For a long time the formation of a company through one person was forbidden in a number of Member States. England for instance did not recognize the single member private company until the nineties. Since the one man company is nowadays a very common figure, it is interesting to know which rules apply to it. For example: what capital requirements should be met by the one man company, in what way should the general meeting existing of one shareholder adopt its resolutions, which rules apply in the case of conflict of interest, in which circumstances can the shareholder be held liable for the companies debts, and so on.

An important development at the European level is that in December 1989 the Council of the European Communities adopted the twelfth company law directive. This directive aims to introduce one man companies in all Member States. In view of this, the directive states in article 2 that a private company may have only one member, both at the moment of its formation and also afterwards in case its shares have come to be held by a single shareholder. The European legislator interfered with the one man company because several Member States didn’t permit the single member company. The European legislator thought it desirable to supply the sole trader throughout the European Union with a legal instrument which allows him to limit his liability. In this way the sole trader is encouraged to take the risk of setting up a business in the form of a company.
The limited liability company is regarded as a necessary condition for business development in the European internal market.

The sole trader must pay a certain price if he chooses to use a one man private company for his business activities. The directive contains specific rules for this type of company. Article 3 directive provides that a one man company has to disclose the identity of the sole member. The underlying reason is that the fact that the company has only one member may be of interest to those dealing with it. The articles 4 and 5 directive purport to regulate the behaviour in the single member company. Article 4 states that the sole member is to exercise all the powers of the general meeting and that his decisions in this capacity must be recorded in minutes or drawn up in writing. According to article 5 directive the same applies to contracts between the sole member and his company as represented by him.

Where a Member State allows the single member public company as well, the specific rules laid down in the articles 3-5 directive shall also apply (article 6 directive).

This is in short the content of the directive. It is obvious that it is not the aim of the twelfth directive to achieve a full harmonisation of the rules applicable to the one man company.

The deadline for implementation of the twelfth directive has expired: the Member States should have taken all measures necessary to comply with the twelfth directive before 1 January 1992 (art. 8 directive). This means that the relevant national statutory provisions and case law should now correspond to the directive.

The purposes of my study are threefold:

1. To examine the way in which national legislators and courts approach the one man company. A review is given of the rules applicable to the one man private company in the Netherlands, Germany, France, Belgium and England. These rules are analyzed critically.

2. To judge whether the twelfth directive has been implemented correctly in the various Member States.

3. An important theme is the relationship between the new rules originating in the twelfth directive and the other rules of Dutch company and private law. Consequently the question is raised whether the Dutch legislator should introduce further specific provisions for the one man company.
Part I (Chapter 1) deals with the European level: in this part the European rules in the field of the one man company are described. The twelfth directive takes an important place herein. The exact meaning and scope of each provision of the directive are determined.

An interesting aspect of the twelfth directive is its restriction of the possibility to hold the sole shareholder liable for the company’s debts. As has been mentioned above, the European legislator interfered with the one man company in order to provide the sole trader with an instrument to limit his liability. In some Member States such a limitation of liability was not possible, because the national law held the sole shareholder liable for the debts of the company. The directive changed this situation by obliging each Member State to introduce the one man private company. The question raised is, to what extent the twelfth directive allows a natural person who is a sole shareholder to be made liable for the company’s debts. In answering this question art. 2 of the directive is important. Art. 2 paragraph 1 of the directive provides:

1. 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 (single-member company).

It should be noted that during the discussion of the draft directive, the European Parliament requested that art. 2 paragraph 1 should state that when the sole shareholder is a natural person he can not be held liable for debts of the company. This should only be different in exceptional cases. The European Parliament wished to stress that it should be the rule that the sole trader who does business through a one man company enjoys the privilege of limited liability. The European Commission accepted this request of the European Parliament and added to the fifth consideration of the preamble of the directive, which originally stated:

Whereas it is important to provide a legal instrument allowing the limitation of liability of the individual entrepreneur throughout the Community

the following words

without prejudice to the laws of the Member States which, in exceptional circumstances, require that entrepreneur to be liable for the obligations of his undertaking;

It follows from article 2 paragraph one of the directive, read in connection with the preamble, that the principal rule is that a natural person who holds all the
shares of *one* private company can not be held liable for the company’s debts merely because he is the sole shareholder. He is only liable in exceptional circumstances. Here one should think for instance of cases in which the sole shareholder harms the interests of creditors of the company.

In examining the extent to which a natural person who is sole shareholder can be held liable, a further provision of the twelfth directive is important, namely the second paragraph of article two. The European legislator permits Member States to make special provisions where a natural person is sole member of *two or more* companies. In this particular case Member States can provide for a liability of the sole shareholder for the companies debts. Belgium made use of this option. The Belgian Companies Act states that a natural person may create only one private company. The natural person who acts in contravention with this rule stands for the payment of debts of the second company should this become insolvent.

For the sake of completeness it should be noted that, according to article 2 paragraph 2 directive, Member States may lay down special provisions or sanctions for cases where a legal person is the sole member of a company. It is at the discretion of the Member States whether the privilege of limited liability applies where a legal person is the sole shareholder of a company.

*Part II* (Chapters 2-6) of the study deals with the national level. This Part contains an analysis of the national laws on the one man company. Each national portrait is sketched using the same format. First attention is paid to the definition of the one man company. That is to say: which companies are regarded in the concerning Member States as one man companies. It is remarkable that in all Member States the definition of the one man company is a very formalistic one. When the sole shareholder holding a thousand shares sells only one share to another person, the company is no longer a one man company.

The national laws applicable to the one man company are examined on the basis of five categories of rules. The first category consists of company law provisions relating expressly to the one man company. An example of such a provision is the rule that contracts between the single member private company and the sole shareholder should be drawn up in writing. This rule exists in all Member States included in the study. This is not coincidental since the twelfth directive obliges each Member State to introduce such a rule in their national laws. By means of considering the specific rules applicable to the one man company, insight is given into the way in which the twelfth directive has been implemented in the national systems. Apart from the specific rules derived from the directive the Member States’ ‘own’ national rules are also of importance. The legal framework of the one man company is still largely based on these rules. The second category of rules consists of company law rules, which do not relate specifically to the one man company but which are of special importance.
type of provision. In this respect the laws of the Member States differ considerably. The English law for instance is very flexible: in England no minimum capital is required for the private company. Germany, on the other hand, is very strict: for the incorporation of an Einmann-GmbH a minimum capital of 50,000 DM is prescribed. The third set of rules considered in this part is formed by insolvency law provisions. This category includes among others rules which purport to prevent the company to continue trading after it has become insolvent. These rules are of major importance where the one man company has become insolvent. The sole shareholder who usually is also the sole director has a strong incentive to continue trading, as he has everything to gain and nothing to lose. It is concluded that in all Member States directors can be held personally liable if they allow the company to continue trading at the expense of the creditors. The techniques used in the various Member States to recover damages from the directors were, however, found to differ considerably. The fourth category consists of civil law provisions which are of special importance to the one man company. The focus here is on the tortious liability of the sole shareholder towards creditors. To the final category belong non-statutory rules which can be of importance to the one man company. Each national portrait ends with a conclusion, in which some attention is paid to the differences between the one man company and the company with two or more shareholders. Attention is also paid to the question of the autonomy of the one man company vis-a-vis the sole shareholder.

In *Part III* (Chapter 7) the lines drawn in Part I and II come together. In this Part the question whether the twelfth directive has been implemented correctly in the various Member States is answered. It is submitted that at some points the national rules are not in accordance with article 2 directive. The French legislation provides for example that in case of dissolution of the one man company all its assets and liabilities automatically pass to the sole shareholder. No liquidation has to take place. This implies that when an insolvent company is dissolved, the sole shareholder is automatically liable towards the company's creditors. It is submitted that this French provision clashes with the twelfth directive. The dissolution of a company can not be regarded as an exceptional case in the meaning of the directive. It is also concluded that art. 7:404 of the Dutch Civil Code, which concerns the contract to provide services, is in contravention with the directive. This provision implies that when a contract to provide services is concluded with the company and with a specific person in mind, this person is obliged towards the company's creditor to make good any damage resulting from the carrying out of the contract. It is submitted that personal liability for eventual damages can not be based on the mere fact that the contract was con-
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cluded with a specific person in mind. The conclusion is that the French and the Dutch legislators are obliged to change their legislation.

With respect to the special provisions, the study shows that the national rules of some Member States do not comply with article 3 and 5 of the twelfth directive. The Dutch, German and French legislators have not taken sufficient measures to enable the company to disclose the identity of the sole shareholder. The Belgian and England laws do not comply with article 5 directive. The legislations of the lastmentioned Member States only require contracts between the sole member and the company to be drawn up in writing, in case the company is represented by the sole shareholder in his capacity as director. In the view of the European legislator it does not make any difference in which capacity the sole shareholder represents the company.

In Part III unintended effects of the directive are also discussed. The directive has caused breaches in the company law systems of some Member States. The Dutch Companies Act traditionally does not distinguish between companies with one shareholder and companies with several shareholders. The implementation of the twelfth directive caused the Dutch legislator to introduce specific rules for the one man company in the Companies Act.

In the final Part, *Part IV* (Chapter 8), the question whether the Dutch legislator should introduce any other rules relating to the one man company is answered. As was concluded above, the national legislation must be revised in two respects in order to comply with the directive. It is submitted that otherwise the national legislator and courts can deal quite well with the figure of the one man company. The study shows that the one man company does not give rise to problems which demand for rules relating expressly to the one man company. The difficulties pointed out, do not only occur in one man companies but also in companies with two or more shareholders. They should be solved by means of general rules which apply to all companies.

Another reason why the legislator should show restraint in introducing specific provisions for the one man company, is that it is easy to evade such statutory provisions because of the formalistic definition of the one man company used by the legislator. Therefore it is submitted that special provisions, should these prove necessary, should be based on a less formalistic definition of the one man company.