Rue de la Science 21-23
1040, Brussels
Belgium

+32 2 216 92 47

www.europeanissuers

EuropeanIssuers' Position on the

European Commission's Proposal for a 28th Regime Corporate Legal Framework ('EU Inc.')

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EuropeanIssuers is the pan-European organisation strategically positioned to represent the interests of publicly quoted companies across Europe to the EU institutions. We aim to ensure that EU policy creates an environment in which companies of all sizes - from emerging growth companies to the large blue-chip companies - can easily raise capital through the public markets and deliver growth over the longer term.

Our members include both national associations and companies from all sectors in 14 European countries, covering markets worth €12.4 trillion market capitalisation with approximately 6,000 companies.

EuropeanIssuers welcomes the European Commission's proposal for a **28th Regime Corporate Legal Framework ('EU Inc.')**.

As already stated in the preparatory consultations leading up to this proposal, a 28th regime on company law could allow companies operating in Europe to benefit from a single, harmonised set of EU-wide rules wherever they invest and operate in the Single Market.

For the first time, we are faced with a potential set of directly applicable European company law provisions governing a new type of (harmonised) limited liability company - the EU Inc. - which is optional and stands along with national legal forms. This approach represents a significant step forward in the integration of the internal market and should be supported.

It is worth noting that the previous attempt at a pan-European company form - the Societas Europaea, launched in 2004 - was largely unused because it was too complex and too limited. EU Inc. must therefore be demonstrably better than the national alternative, not just theoretically equivalent. In this respect, it is fundamental to ensure that the EU Inc. Regulation is self-sufficient and that reference to national law is limited to a minimum and specific.

A key aspect of the EU initiative is that the EU Inc. is designed as fully digital. We fully support this approach and that the EU Inc. Proposal promotes and facilitates the use of digital tools for the formation and the functioning of the company.

The once-only and digital-by-design principles - including among others digital incorporation and operation, automatic transmission of information to authorities, digital shareholder meetings, full integration with the European business wallets - should be strongly upheld in the final text and strictly adhered to in order to ensure a quick, simple, and fully online-created company form. We also support a centralised, user-friendly EU central interface allowing companies to complete procedures without having to rely on twenty-seven different national systems, while we believe that this proposal could go even further. It represents a first step toward the creation of a single EU-level register.

Ensuring full digital functioning of the EU Inc. and implementing the interoperability between systems and registers, as provided for in Article 20, will not be automatic or cost-free and the issue of costs is not covered by the Regulation. However, this is a sensitive issue, since it requires implementation efforts and investments at national level which are fundamental for the success of the EU Inc.

EuropeanIssuers supports the general approach followed by the Regulation and shares comments on the following specific topics:

- **Scope**:

The decision not to limit the scope of EU Inc. solely to categories of businesses such as start-ups or innovative enterprises is a key feature of the proposal, which must be upheld, as it gives it a broader systemic reach.

However, in this respect, we note that the simplified insolvency provisions - which we generally support - apply only to “innovative startups”, thereby creating a sub-category and reintroducing classification issues that the proposal otherwise aims to avoid. We suggest providing that the insolvency regime applies to all EU Inc’s. As an alternative these provision could be transferred to a dedicated piece of legislation

- **Formation of the EU Inc.**:

We fully support the proposal, which ensures maximum flexibility regarding the formation of the EU Inc., allowing it to be established by both natural and legal persons, ex nihilo, or through conversion from existing companies. Existing companies, including EU Inc. companies, can also set up EU Inc. subsidiaries, thereby making the EU Inc. legal form available for groups of companies, as well as through domestic divisions or mergers, or cross-border conversions, mergers or divisions.

However, the proposal does not mention the SE as a possible parent company. Article 19 refers to Annex II or IIB of Directive (EU) 2017/1132, which lists the national company forms in the Member States. It is possible that the SE is regarded here as a national company form, essentially taking the form of a national public limited company. However, this should be expressly clarified, namely that an SE can be the parent company of an EU Inc.

Finally, it would also be useful to explicitly provide that an EU Inc. can be converted into a company under national law without being dissolved and re-incorporated.

- **Applicable rules (Art. 4)**:

According to Article 4, EU Inc. companies are governed by (i) the Regulation, (ii) the articles of association, and (iii) for matters that are not covered by this Regulation and the articles of association, the national law of the Member State in which the company has its registered office or by the articles of association on a residual basis.

The proposal provides that the State of registration is chosen at the time of incorporation, which has the advantage of being certain and easily determinable and follows the established case law of the Court of Justice (and the Directive on cross-border extraordinary transactions).

The Regulation provides for a core set of uniform rules and leaves room for statutory freedom to adapt the articles of association to the changing needs of companies and investors, both in terms of derogating from default rules and adding specific rules.

Article 4 introduces a general reference to applicable national law for matters not governed by the Regulation. However, it is not clear what is meant by "matters not governed." In particular, it must be asked whether and to what extent a corporate matter not governed by the Regulation may be governed by the articles of association and how this interacts with national provisions.

In addition to this general reference, the text of the proposal also contains a series of specific references to certain aspects of national law (consider, for example, the issue of directors' liability in Article 44). The simultaneous existence of specific references to national legislation and a general reference appears to be an unclear and inconsistent choice.

The effectiveness of the EU Inc. instrument depends on the Regulation's actual self-sufficiency vis-à-vis national laws and on the scope left for statutory autonomy. It is essential that the Regulation comprehensively covers all matters for which a common framework is necessary and currently lacking, including, for example, rules on the nullity of corporate decisions at both board and general meeting level.

Lastly, Article 4 provides that Member States shall designate the relevant national legal form to be applied to the EU Inc. on a residual basis. In this respect, it could be useful to clarify that Member States may designate two relevant national legal forms, when necessary.

- **Articles of Association (Art. 7)**

We support that, regardless of the Member State of registration, the articles of association for the EU Inc. shall (i) be laid down in a single document, (ii) include a minimum content, (iii) be digital, machine-readable and store information as structured data, and (iv) be drawn up in at least one of the official

language or languages of the Member State of registration and in a language customary in the sphere of international business and finance.

We also support the establishment of harmonised and multilingual EU templates for articles of association for EU Inc. companies.

We further support the proposed fast-track company formation procedure within 48 hours and at a maximum cost of EUR 100 where harmonised templates are used, and that existing companies would be able to set up subsidiaries through the same procedure.

However, this benefit only applies where EU templates are used and remains subject to the possibility for authorities to require physical presence in exceptional cases. Where companies opt for tailor-made articles of association, longer timelines and higher costs would apply.

It is therefore essential that the templates developed by the Commission reflect real-life needs and market practices, including multiple share classes, preferred equity, weighted voting rights and other features required by high-growth companies raising external capital.

We also find the following sentence unclear, which risks discouraging the drafting of tailor-made articles of association: "Where an EU Inc. company adopts the standard articles of association as referred to in Article 8, both language versions shall have equal legal value. Where an EU Inc. adopts non-standard articles of association, the official language or languages of the Member State of registration shall prevail in the event of a discrepancy between the language versions. The EU Inc. shall be liable for any damages caused to third parties acting in good faith who relied on an inaccurate, incomplete, or misleading version in a language customary in the sphere of international business and finance of the non-standard articles of association" (Article 7(5)).

- **Enforcement (Recital 81)**

As correctly noted in Recital 81 of the proposed Regulation, one of the main risks in this context is divergent application. In the absence of a single forum, different national courts could interpret the Regulation differently, thereby undermining uniformity and legal certainty, which are fundamental objectives of the 28th regime.

In the short term, convergence could be strengthened by requiring Member States to establish specialised judicial divisions for disputes involving EU Inc. In this respect, implementation within national legal systems could initially be entrusted to existing specialised divisions. However, this would require those divisions to develop specific linguistic and comparative law expertise, which should be duly reflected in their training.

Additional tools could include a European case law database, joint training programmes for judges, and interpretative guidelines.

In parallel, to provide EU companies with a rapid dispute resolution mechanism, the possibility to refer disputes to arbitration should be provided for. To facilitate the creation of an initial body of interpretative precedents and ensure a certain degree of transparency, this could be complemented by the anonymous publication of outcomes.

In the long term, supranational solutions could be considered, such as a European arbitration body or a specialised court at EU level.

- **Access to market (Art. 60)**

The proposal recognises the importance of listing as a financing tool among others and makes access to regulated markets optional. Against this background, the co-legislators should examine in greater depth whether the Regulation should directly provide that Member States must not prohibit listings on MTFs and regulated markets (Art. 60).

There is a Europe-wide trend towards expressly allowing private companies to have their shares traded on capital markets. This is reflected, for example, in the shares of Dutch BVs, Belgian BVs and Italian PMI-SRLs. If, against this backdrop, access to capital markets were denied to the EU Inc., it would suffer a considerable loss of attractiveness in international comparison.

In any case, the EU Inc. must be designed in a way that is compatible with capital markets law and market expectations on good corporate governance where it applies for listing.

On regulated markets in Europe, different company forms exist with differences in corporate governance (one-tier vs two-tier boards) and, for example, in minority shareholder protection in detail. For example, the German Aktiengesellschaft has stricter rules on capital increases than a Dutch N.V., yet both company forms are listed on the Frankfurt Stock Exchange. Until the application for listing, the EU Inc. retains the statutory freedom provided for in the Regulation.

A further point of criticism remains that, despite largely harmonised corporate governance rules, the proposal does not provide for a unified regime for listed EU Inc. companies, merely referring to Union law and applicable national regulations. This entails the risk of significant regulatory and enforcement fragmentation, despite the advanced degree of European harmonisation in areas such as prospectuses, market abuse, transparency, shareholder rights, takeover bids and statutory audit.

A further step could be to develop a single European regulatory framework for listed EU Inc. companies, possibly accompanied by centralised supervision by ESMA.

As to the current proposal, individual provisions of the Regulation must not hinder listing and should provide that, where needed, an adjustment is required (in the sense that the regime changes upon listing). This is the case, for instance, of the digital share register provided for in Article 54, which is not compatible, as it stands, with the current EU regime on dematerialised central securities depository systems and post-trading applicable to listed companies. Therefore, in order to ensure coherence in relation to public trading, an exemption could be included in paragraph 3 of Article 60 stating that

Article 54 does not apply, but that the requirements of the operator of the trading venue or exchange do apply.

- **Internal organization (Art. 42)**

According to Article 42, the articles of association shall lay down the rules concerning the organisation of the EU Inc. company and the conditions under which it is managed. The company shall have a board of directors, which shall be responsible for the management of the company, and the board of directors may exercise all the powers of the company that are not required, in accordance with Article 4 and the applicable rules, to be exercised by the general meeting or by another statutory body.

We agree that maximum flexibility should be left to the articles of association in shaping the internal organisation of the company. We also support the provision that the board of directors shall consist of one or more directors. However, we suggest that not only natural persons, but also legal persons, can be appointed as board members, provided that a common harmonised regime is established in the Regulation.

The articles of association should provide for the statutory existence of collective bodies (board, management board, supervisory board). The scope of their duties, as well as the methods of appointment, dismissal and operation, should be left to the bylaws. According to the proposed Regulation, the bylaws should determine which decisions must be taken by the sole shareholder or by all shareholders, in the manner and under the conditions laid down therein. Regarding form, these decisions could be taken at a physical or remote meeting, or by written consultation. Shareholders' rights to information could also be defined in the articles of association.

In this respect, we consider problematic the provision according to which the general meeting may give instructions to the board of directors and that those instructions shall be binding on the board of directors, unless they are contrary to the applicable rules. Therefore, this provision should be deleted.

- **Directors 'duties (Art. 44)**

The provision set out in Article 44 of the proposal, which outlines the circumstances in which a director is not liable to the company, is to be welcomed. In particular, it excludes directors' liability to the company for damages or losses arising from corporate decisions where three conditions are met: (i) that the directors acted in good faith; (ii) that they exercised the care of a reasonably prudent person; and (iii) that they had a reasonable belief that they were acting in the best interests of the company.

This provision, whilst laudably intended to provide a safeguard for directors, may not be entirely clear. In particular, it refers to the situation where a director is not held liable if they have also exercised the care of a reasonably prudent person. This approach could lead to behaviour aimed at avoiding particularly innovative activities, which by their very nature carry a high degree of risk and may not be consistent with the profile of a reasonably prudent person. This is particularly relevant for innovative companies, where such risks are more prevalent.

- **Meetings (Art. 47)**

We welcome flexible rules on meeting formats and decision-making. It is essential that each company can organise its meetings and decision-making in the way that best suits the needs of the company and its owners - physically, digitally, hybrid, or through written procedures.

- **Employee participation (Art. 12) and EU-ESO (Art. 78)**

Employee participation should remain governed by national law. The EU Inc. Regulation should not include specific provisions on labour law in addition to what is foreseen by Article 12.

We support the provision of a framework for an EU Employee Share Ownership Plan (EU ESO) and more flexible employee participation.

Such instruments respond directly to the demands of entrepreneurs who face challenges in offering consistent benefits to their employees across the Single Market. Therefore, a 28th Regime company should provide an opportunity to facilitate the right to establish an employee stock option plan, enabling it to attract talent while allowing employees to gain an ownership interest in the company.

Warrants under an EU ESO should be subject to a minimum vesting period and should not be issued to persons already holding a significant stake, and the board should be authorised to issue and satisfy such warrants within the limits of the plan.

- **Share transfers (Art. 57)**

We support that share transfers can occur without restriction, unless otherwise provided in the articles of association (Art. 57). A default regime for rules on the transfer of shares would be useful to avoid transaction costs; however, these rules should not prevent any customisation that the parties may wish to include to ensure a certain balance of interests (preferences, pre-emptive rights, co-sale rights, etc.).

While all shares should have equal rights and obligations, the EU Inc. should be allowed to provide for different classes of shares with different economic or voting rights to adapt to the requirements of certain shareholders. Member States should not prohibit or condition such distinctions under national law.

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