The 28th Company Law Regime

1. This paper (the "Paper") presents the feedback of the Belgian Centre of Company Law ("BCCL")[1] on the ideas for a 28th Company Law Regime, as part of the Consultation which the Commission has organized on this topic. The BCCL is a non-profit organization bringing together virtually all Belgian corporate law scholars and various Belgian corporate law practitioners with an academic affiliation. Various members of the BCCL were actively involved in drafting the Belgian Companies and Associations Code ("BCCA"), which was adopted in 2019, and the BCCL constituency functioned as a sounding board during the process[2].

The BCCA substantially simplified and modernized Belgian company law, resulting in a very flexible private company law form ("BV" in Dutch; "SRL" in French), which since 2019 is probably one of the most flexible company forms on the European continent. The new Belgian BV/SRL leaves extensive room for the articles of association and contracts (e.g. shareholder agreements) to determine a company's structure, the rights of shareholders (arrangements on voting and profit-sharing) and the governance of the company. The BV/SRL has also abolished the concept of legal capital, while retaining a few key protections for shareholders and creditors, without need to reference the concept of legal capital. These new rules have been tested since 2019 in the Belgian context and function well[3].

The authors of this Paper draw from their prior experience with the Belgian BV/SRL in formulating their policy proposals for a 28th Company Law Regime. In particular, we argue that a 28th Company Law Regime should offer a similar level of flexibility as the Belgian BV/SRL, because too much rigidity would eliminate the attractiveness of the 28th Company Law Regime and fail to achieve the desired outcome.

2. It is not very clear what exactly the European Commission wants to achieve with the 28th Company Law Regime: promotion of innovative, start-up and scale-up companies, and their attractiveness for venture capital, or a revival of the *European Private Company* and/or the *Societas Unius Personae* (SUP) concept, i.e. a top down harmonization of the private limited liability companies through an attractive European corporate form. The BCCL is not convinced that the primary rules of company law will solve the perceived issues for venture capital: those issues have more to do with limitations in some jurisdictions on the creation of hybrid securities, convertible or redeemable shares or more generally contractual freedom to optimally design the "capital structure" of a company, including limits on the validity and

[1] More information on the BCCL can be found on this website: https://bcv-cds.be/home-en/.
[2] Two participants of the working group that drafted the Paper were appointed as academic experts by the minister of justice, together with two other BCCL members, to prepare the BCCA. Among other activities, the BCCL regularly advises the Belgian legislator and publishes proposals to modify the company and associations legislation.
[3] With a few exceptions, where the BCCA should be amended.

enforceability of shareholder agreements, upfront commitments and the like.[4] Also, the risk of "killer acquisitions", often mentioned in the documents emanating from the European institutions, cannot be addressed merely through company law reform. The Commission should be outspoken and unambiguous about the goals and the path forward to reaching those goals: is it creating a legal framework that is attractive to startups and their funding? In that case the creation of a 28th company law form as such will not be sufficient, but should be accompanied by additional measures to allow more contractual freedom in company law, especially when it comes to creating financial instruments and arrangements among shareholders and creditors about claims to the cash flows generated by the company.

3. The BCCL believes that the 28th Company Law Regime should create an all-purpose legal form, and hence be open to all firms irrespective of their activities or growth stage, in other words it would be a bad idea to limit it to companies that qualify as innovative start-up or scale-ups:

a. It is extremely difficult, if not impossible, to define innovative companies or start-ups and scale-ups. The (several) attempts of the Italian legislator to do so provide empirical evidence that this is not a useful approach.
b. If the 28th Company Law Regime is to be attractive and efficient, it should be made available to the entire European business community. It may also facilitate a further harmonization of company law throughout the Union, which could lead to additional benefits to all stakeholders.
c. A 28th Company Law Regime from which only certain firms can profit may trigger different reactions from national company law legislators, adopting similar but also slightly different rules for all companies[5]. Such reaction may negatively affect the attractiveness of the 28th Company Law Regime.

4. The company form of the 28th Company Law Regime should have a pan-European name and abbreviation that are catchy and readily recognizable in all jurisdictions[6]. In view of (3), such name and abbreviation should not include a reference to innovative companies, start-ups, or scale-ups.

5. The applicable 28th Company Law Regime would ideally be fully regulated feasible in a Regulation, which is directly applicable and, more importantly, does not need any further implementation by the member states. The BCCL acknowledges the requirement of unanimity for a regulation is a hurdle. However, a choice in favour of a directive will lead to "27 28th Company Law Regimes", with next to them 27 national regimes for the private limited liability company, some of which will turn out to be much more attractive than the 28th Company Law Regime. There is no virtue to be seen in this result.

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[4] However, we note that such issues exist to a much lesser extent in countries like Belgium and the Netherlands, which have already made their company law much more flexible for private limited liability companies in recent reforms.
[5] Member states that react to this new European development, may tend to propose less stringent rules with a view to nudging companies into opting for their company law.
[6] Such as the existing SE, SCE and the once proposed SPE and SUP. The BCCL does not have a particular stance on the use of Latin, provided the abbreviation is readily recognizable, cannot have different meanings in any of the EU's national languages, can be easily pronounced and does not lead to confusion, and provided that to the abbreviation a full name is added with similar characteristics.

6. In addition, it is generally known that the attractiveness of a company law regime is also heavily influenced by the applicable law in "neighbouring domains" like insolvency law, tax law and social law. The authors of this Paper understand that it would be even more difficult to attempt to harmonize those domains than creating a 28th Company Law Regime limited to corporate law as such. Therefore, it might be politically expedient not to wait with the creation of a 28th Company Law Regime until any realistic chance of "harmonisation" in, e.g., tax law exists. However, they think it is crucial, and realistic, to achieve further legislative harmonization of insolvency law, and in particular of the conflicts of laws issues related to the demarcation between the *lex societatis*, the *lex concursus* and the *lex delicti*. Presently there is far too much legal uncertainty for directors of companies in financial distress in a multi-jurisdictional environment. It is relatively easy to eliminate this uncertainty, and that is a minimum of what the European Commission should endeavour to undertake in the "neighbouring domains". In addition, the authors of the Paper are of the opinion that a 28th Company Law Regime would prove futile from the start if Germany would insist on rules that would apply its labour co-determination system to companies that have no link to Germany. In our view, rules on employee co-determination should be determined by the place of the real seat, despite their link with company law. It is to be noted though that this latter element may be less relevant as smaller firms would rarely be subject to labour co-determination.

7. The BCCL is also of the opinion that, in view of the interpretation by the CJEU of the freedom of establishment, the 28th Company Law Regime should mandatorily determine the connecting factor and that such connecting factor should be the registered office, which means that the company is governed by the company law of the seat indicated in the articles of association, and that the applicable company law can be changed through a cross border conversion, with adequate measures to prevent fraud. Protective measures that are possibly based on the place of business (real seat) will need to be considered in the framework of the legislation to be developed in the neighbouring domains, and possibly also in international private law[7].

8. The company form under the 28th Company Law Regime should be the private limited liability company, with a closed character as default but with the possibility to choose (in the articles of association) for free transferability of shares and even for a listing. In the latter case, some of the flexibility of the 28th Company Law Regime will necessarily cease to apply, in exchange for the more stringent rules of listed entities (such as rules on the presence of independent directors, the installation of board committees, remuneration, related party transactions, and the like). That is not an issue, as the company will have matured by then and should be able to deal with more sophisticated rules.

9. In view of the success of the Belgian private limited liability company since the entry into force of the BCCA (2019), the BCCL pleads for a company form without a legal capital, or, as a second-to-best alternative, with a minimum legal capital reduced to zero. There is much agreement among scholars that in spite of its historical merits as a tool for creditor protection,

[7] Whereby a stricter regime for non-EU companies can be envisaged.

legal capital has since long lost its relevance and is no longer the most apt legal measure for creditor protection, nor for an internal standard for measuring the rights attached to shares. Europe itself is moving away from the latter with the Multi Vote Share Structures Directive focusing on PMEs seeking listing on an MTF[8]. The BCCL is aware of the reluctance of (among others) Germany and France to abolish legal capital but believes this would be a major contribution to the desired level of flexibility. It is obvious that sufficient means to protect creditors need to be introduced. Again, at least Belgian and Dutch law can serve as a source of inspiration, as these legal systems demonstrate that the aims of the legal capital concept can also be reached through alternative and workable legal means. When the BCCA was drafted, the Belgian Federation of Banks explicitly stated its support for the abolition of legal capital (not just of minimum capital), because it plays no role in banks' lending decisions and was not regarded as a tool to protect the banks' interests. Still, the abolition of legal capital does not imply that all creditor protection rules in corporate law should be thrown overboard: their efficiency must be evaluated on a case-by-case basis, but they can be drafted without reference to the concept of legal capital.

10. Flexibility should be the norm: digital incorporation, digital meetings, and use of English (potentially next to a national language but with the same legal value). Europe has already made a lot of progress on the digitalization for enterprises, but legal and practical hurdles remain (e.g., the lack of a uniform form of identification throughout the whole EU for both EU and non-EU citizens). Also, the European Commission should carefully coordinate the 28th Company Law Regime with existing legislation (regarding anti-money laundering, privacy, digital tools, …) to avoid new adaptations when not needed.

The company under the 28th Company Law Regime should have considerable flexibility in defining shareholder rights: it should allow shares without voting rights (without a need to "compensate" this by higher profit rights) and with multiple voting rights, and it should provide complete freedom in allocating profit rights (including through liquidation preferences). The only limit to the flexible allocation of voting rights should be that at least one share with a vote exists, so that the company is not purely controlled by its management body.

The 28th Company Law Regime company should also provide flexibility in the structure of its management body. Companies should be able to choose between a management body consisting of a single director, several directors with competing management powers, a single collegiate board, or a two-tier board (with a management board and a supervisory board). The BCCL recommends granting the residual decision-making power to the management, and reserved matters only to the shareholder's meeting, and keeping the "Prokura" system currently laid down in the Codification Directive[9]. Efficient conflict of interest rules for directors should be mandatory.

Certain rules of mandatory law should be included to provide reasonable checks and balances, sufficient protection of the rights of (minority) shareholders and creditors, and sufficient accountability. The major goal needs to be to produce uniform and well thought-through rules

[8] Directive (EU) 2024/2810 of the European Parliament and of the Council of 23 October 2024 on multiple vote share structures in companies that seek admission to trading of their shares on a multilateral trading facility.
[9] Article 9 Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law, but again, with uniform rules.

that apply in all member states and are not overly rigid or cumbersome. Unfortunately, it will never be possible ensure uniform interpretation of such rules by the courts of different member states, which in view of the legal culture of some EU member states may lead to undesirable interpretations, limiting the flexibility and legal certainty the EU wanted to introduce. We are afraid there is little the EU as such can do about this.

11. The BCCL recommends providing model articles of association at a European level, both for the default rules[10] as well as for the most common options, indicating which rules are mandatory[11].

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The authors of this Paper are Niels Appermont (UHasselt), Hans De Wulf (UGent), Alain François (VUB), Valérie Simonart (ULB), Tom Vos (University of Antwerp & Maastricht University), Marieke Wyckaert (KU Leuven), all board members of the BCV. Steven Declercq (University of Antwerp) and Jérôme Dubois (ULiège) assisted us.

[10] E.g., one share one vote; the majority required for amending the articles of association.
[11] Such as, if that would be the option taken, the maximum multiplicator for multiple voting rights.