Position Paper from the Belgian Centre of Company Law on the EU Inc. Proposal

Executive summary

The Belgian Centre of Company Law (the "BCCL") welcomes the Commission's EU Inc. Proposal, in particular the emphasis on online formation and deliberation, the "once-only" principle, the use of a Regulation rather than a Directive, and the introduction of EU-level templates for articles of association.

At the same time, the Commission should consider a more balanced approach to creditor protection. The current proposal contains fewer mandatory safeguards than even most national private company forms, which may provoke resistance from Member States. We therefore suggest that the Commission considers introducing a number of targeted creditor-protection measures.

The BCCL is not fully aligned on a further crucial choice to be made: either the EU Inc is made available to European entrepreneurs as a very flexible company form with very little mandatory nor default rules, leaving much contractual freedom to shareholders to make specific arrangements in the articles of association and in shareholder agreements; or the EU Inc provides not only a reasonably balanced approach to the protection of creditors, but also of shareholders. While all of the undersigned agree on the need for additional creditor protection mechanisms, for some of the undersigned, the current proposal does not meet a sufficient standard with respect to shareholder-protection and should therefore be completed by some additional mandatory shareholder-protection or at least default rules as well.

In both approaches, however, Article 4 of the EU Inc. Proposal should be substantially revised to clarify the relationship between the Regulation, the articles of association and national law. The Regulation should also provide greater legal certainty. Fragmenting the EU Inc. into twenty-seven national variants should also be avoided.

We also believe that the success of the EU Inc. will depend largely on the design of the EU templates. Different templates should be developed for simple founder-owned companies and corporate subsidiaries, on the one hand, and for more sophisticated investor-backed companies, on the other hand, for some of the undersigned to be complemented by templates for shareholder agreements. These templates should benefit from a safe harbor with regard to their enforceability.

Finally, we make several other suggestions for improvement, which are of a more technical nature.

Because of the disagreement on the vital point set out above, two notes have been submitted to the Commission's Call for Evidence on the EU Inc. Proposal, one on behalf of the BCCL, and one by Hans De Wulf and Tom Vos. Nevertheless, there is agreement on may other aspects of the current proposal.

I. Introduction and appreciation for positive elements of the EU Inc. Proposal

This position paper comments on the Commission's proposal of 18 March 2026 for a "Regulation on the 28th regime corporate legal framework - EU Inc." (hereinafter the "EU Inc. Proposal"). The EU Inc. Proposal represents one of the most ambitious initiatives in European company law in recent memory. We commend the Commission for the speed with which it has addressed this important issue, and we acknowledge that the EU Inc. Proposal contains a considerable number of genuinely welcome features. In particular, we support the following choices made by the Commission:

- The choice of a Regulation as the legal instrument, rather than a Directive, as it holds the promise of genuine uniformity rather than a patchwork of national implementations (although Article 4 of the EU Inc. Proposal risks re-introducing such a patchwork, as we discuss below);[1]
- The emphasis on online formation, while providing for a certain level of preventive control, and the facilitation of electronic deliberations by boards and general meetings;
- The provision of EU-level template articles of association, which we regard as crucial to legal certainty and the reduction of transaction costs; this will be all the more so to the extent that the contents of the Regulation are kept to a bare minimum;
- The introduction of a "once-only" principle with respect to corporate disclosures, which could substantially alleviate administrative burdens for companies, their founders and their directors;
- The abandonment of minimum capital requirements, in line with the current legislation for private limited liability company forms in many Member States;
- The possibility of issuing true no par value shares, as is already possible in Belgium and Finland;
- The decision to leave many matters relating to governance and shareholder rights to contractual freedom in the articles of association, although, as set out above, there is divergence within the BCCL as to whether a few crucial mandatory rules and well thought through default rules on these matters should be included in the Regulation itself;
- The principle that employee co-determination shall be governed exclusively by the law of the registered office (save where the EU Inc. is established by means of a cross-border conversion or merger).

In what follows, we do not rehearse these positive features at length. Instead, we focus this paper on those aspects of the EU Inc. Proposal that in our view require further attention, where the current drafting leaves significant room for improvement or where we believe the Commission has missed an important opportunity. In doing this, we indicate where opinions diverge among the undersigned.

II. Realism about what the Regulation can achieve

The first issue we wish to raise concerns the stated objectives of the Regulation, and the risk that expectations about its transformative impact may prove to be significantly overstated.

Article 1(e) of the EU Inc. Proposal lists among the EU Inc. Proposal's major objectives the removal of obstacles with respect to financing EU Inc. companies and investment in such companies, which is a

[1] As company lawyers, we do not take a position on whether article 114 TFEU is an appropriate legal basis for a Regulation with the content of the EU Inc. Proposal.

laudable objective in itself. However, we submit that the EU Inc. Proposal, as currently drafted and even if substantially improved along the lines we propose below, will not and cannot address some of the most fundamental structural deficiencies in European capital markets. The EU Inc. Proposal will not facilitate the financing of European companies in any direct sense, will not channel pension fund capital towards start-ups, will not render the funding of companies in Europe more capital-market-oriented and less bank-reliant, and will not in any significant way stimulate the venture capital ecosystem in Europe. These are critical problems, but they are not amenable to resolution through a company law instrument of this kind.

One of the persistent structural weaknesses of the European entrepreneurial landscape is that, while new companies are frequently created, they do not scale at a rate comparable to their counterparts in the United States or elsewhere outside Europe. While company law can play a role in addressing some of the conditions that enable scaling, many of the most relevant legal rules lie entirely outside the domain of company law. Tax, social security and insolvency issues fall largely outside the scope of the EU Inc. Proposal and will have an important impact on the European entrepreneurial landscape.

It should also be noted that courts and, in some Member States, legal scholars exert a powerful influence on how statutory texts are interpreted and to what extent articles of association are allowed to shape the actual functioning of companies in practice. An EU Regulation can do relatively little to displace this influence — though, as we argue below, there are mechanisms that can and should be used to limit the distorting effect of national judicial and doctrinal influence on the uniformity of the EU Inc. regime. However, for some of the undersigned, this absolute priority for the Regulation is only acceptable if the Regulation provides for a sufficiently complete and balanced legal framework, duly taking into account the rights of all stakeholders including shareholders. The EU Inc. Proposal does not yet meet that standard.

What the Regulation can realistically achieve — and this is, in our view, genuinely important — is the creation of a flexible company form that is accessible to entrepreneurs seeking to establish a business, and that can also serve as a vehicle for subsidiaries across multiple Member States. In-house lawyers working for corporate groups frequently report that a disproportionate amount of their time and resources is consumed in managing the fact that broadly similar rules for subsidiary companies in, say, France, Slovenia, and Poland, nevertheless differ in their details so as to require local external legal expert advice and to generate substantial "corporate housekeeping" costs. A well-designed EU Inc. could yield significant savings in this context. We believe the Commission may not fully appreciate how significant and how realistic this particular objective is, and we would urge it to frame and communicate the goals of the Regulation with this use case prominently in mind.

Finally, the EU Inc. Proposal may encourage some Member States to make their national company laws more flexible, due to the regulatory competition offered by the EU Inc. In addition, if the EU Inc. Proposal is improved and sufficient legal certainty can be provided, we may see some start-ups and scale-ups opting for the EU Inc. instead of certain less flexible company forms from EU Member States. This may convince some founders (and the investors in their company) to retain their EU incorporation, instead of doing a “Delaware Flip” and reincorporating in Delaware at the demand of international investors. At the same time, there is no guarantee that EU Inc. companies registered in the EU will keep their headquarters and operations in Europe and will list on a European stock exchange when they

decide to go public. Such decisions are mostly driven by factors other than those covered in the EU Inc. Proposal. If the EU Inc. were to replace the national company forms but in the end did not achieve the flexibility desired by VC investors, it would become, in the opinion of some of the undersigned, even more crucial that the Regulation provides a balanced and sufficiently complete framework duly taking into account the interests of all stakeholders including shareholders.

III. The lack of mandatory creditor protection and the competitive challenge to national company forms

If the Regulation is well designed, it will create a legal form that is in direct and systematic competition with national company forms. Many entrepreneurs may opt for an EU Inc. instead of a national private company form (such as the Belgian or Dutch BV, the French SARL or SAS, the German GmbH, or any of their equivalents), as the EU Inc. would generally be subject to fewer mandatory rules than any of these national forms. This is, in our view, not necessarily a negative outcome: regulatory competition can serve legitimate functions. However, once Member States become fully aware of this, the EU Inc. Proposal could face significant national headwinds. We think the Commission could pre-emptively counter such national resistance by adopting a more balanced approach to creditor protection in the final version of its EU Inc. Proposal.

Indeed, it is clear that the EU Inc. Proposal contains few rules on creditor protection, which could harm in particular involuntary and non-adjusting creditors, who cannot bargain for their own contractual protections. Member States are unlikely to accept such a low level of creditor protection and may try to impose (differing) national rules[2]. We draw the attention of the Commission to the fact that even in those "progressive" Member States that have abolished legal capital (such as Belgium) or dramatically reduced its significance for private companies (most other Member States), a range of "countervailing measures" to protect creditors have been maintained or introduced.

We believe that it is desirable that such matters of creditor protection are harmonised at the EU level for the EU Inc., rather than left to diverging rules at the Member State level. We therefore encourage the Commission to consider adopting some of the following creditor protections, for which inspiration can be found at the Member State level:

- Creditor protections at the incorporation of the company, such as the obligation to submit a (confidential) business plan that can be disclosed to the bankruptcy trustee in the event of a subsequent bankruptcy, and/or rules on founders' liability in cases of manifest undercapitalisation;
- Rules on directors' and founders' liability for breaches of their duties that can be enforced by the bankruptcy trustee, or by individual creditors directly harmed by such breaches;
- Creditor protections in case of serious loss or financial distress, such as disclosure obligations and duties for the directors to call a general meeting to decide on the future of the company and possible restructurings. Such serious loss procedures could be triggered when the net assets fall below the amount of capital (or below zero if there is no capital), for example. They can also

[2] They may, for example, be incentivized to frame such rules as insolvency rules, based on the CJEU's ruling in Kornhaas (Case C-594-14 of 10 December 2015, ECLI:EU:C:2015:806), even in cases where it might have been better to include such rules within the sphere of company law.

be coupled with a duty for directors to monitor the company's solvency and liquidity through interim accounts.

Moreover, we note with regret that the Regulation does not address an important issue that is both practically urgent and amenable to resolution within the framework of a company law instrument: the further harmonisation of rules on directors' duties in the vicinity of insolvency. In addition, to the extent that rules on creditor protection are not fully harmonised at the EU level, the EU should clarify at least in the EU Inc. Proposal which Member State's law applies (the *lex societatis* or the *lex concursus*) when claims are brought against the founders or the directors after insolvency. Case law from the ECJ and national courts has clarified several issues in this field, but many questions remain unresolved and disputed. The recently adopted EU Directive harmonising aspects of insolvency law (Directive 2026/799) does not address this issue either. To leave this boundary unresolved is to leave companies, directors, their advisers, as well as creditors exposed to a significant and unnecessary source of legal uncertainty.

Some of the undersigned take the critique to a more fundamental level: they are of the opinion that, apart from reasonable creditor protection, the Regulation should also be more comprehensive in matters of shareholder rights and protection. An EU Inc. serving all business purposes in competition with national company forms should be based on a Regulation providing a balanced and sufficiently complete framework duly taking into account the interests of all stakeholders including shareholders. The current EU Inc. Proposal does not meet that standard. The proponents of this view are wary of a legal system where the contractual freedom is almost absolute, as this may create a too high risk of abuse by a controlling shareholder or, for that matter, by the shareholder with the highest bargaining power or sophistication, or with the deepest pockets. Attention should therefore be given to, at least: (i) rules on the validity of decisions of corporate bodies (both the board of directors and the general meeting) and the possibility to challenge them, (ii) more elaborated default rules on governance and (iii) more elaborated and balanced mandatory rules on shareholder dispute resolution mechanisms before a court (both withdrawal and exclusion). The BCCL board members adhering to this view are confident that a reasonable compromise based on existing legal traditions in most Member States is achievable in most of these matters. It will need to be further discussed which rules should be mandatory, and which rules could be default rules only - opinions may differ in this respect as well – but adequate choices should in any event be made in the Regulation itself.

IV. Rewriting Article 4

We turn now to what we regard as one of the most important structural deficiencies in the current draft: the inadequate and unclear treatment of the relationship between the Regulation, the articles of association, and national law in Article 4 of the EU Inc. Proposal. Unless Article 4 is fundamentally rewritten, the EU Inc. risks generating twenty-seven distinct national variants rather than a single uniform European corporate form, as national statutory rules, national judges, and national gatekeepers (notaries, court registrars, and others) will each play their respective roles in effectively re-nationalising the EU Inc. Furthermore, the relationship between the Regulation, the articles of association, national law, and shareholder agreements — the last of which is not addressed in the EU Inc. Proposal at all — remains deeply unclear. This should, in the view of the BCCL, be avoided at all costs. Several aspects of Article 4 of the EU Inc. Proposal therefore need to be clarified.

However, depending on the approach taken towards the contents of the Regulation - on which the undersigned are not fully aligned - the issues raised below are more or slightly less pressing. Below we set out both views and their impact on Article 4.

Some of the undersigned take the view that, provided the legal uncertainty created by Article 4 of the EU Inc Proposal is resolved as set out below, the current minimalistic approach taken by the EU Inc. Proposal is acceptable. They indeed plead in favor of a minimalistic Regulation with maximum contractual freedom for shareholders replacing national law.

First, it appears obvious that the articles of association must comply with the Regulation. However, it is unclear whether the drafters intend all provisions of the Regulation to be mandatory unless the Regulation expressly provides otherwise. This would not seem to be the intent, but the text of Article 4 is ambiguous. **This view therefore proposes that the Regulation contains a clear statement on whether its rules are in principle mandatory or only default rules, where nothing is provided. In addition, it takes the view that if the rules in the Regulation are in principle mandatory, the provisions relating to shareholder rights and governance of the EU Inc. should systematically stipulate that the articles of association may deviate from and supplement the Regulation.**

Second, the question arises as to the extent to which national law can supplement the Regulation and the articles of association. Article 4 states that national law governs matters "*not covered by this Regulation or by the articles of association*". But what if the Regulation or articles of association impose certain, but limited, rules to protect stakeholders in a given situation: can national law still impose additional stakeholders protections in those situations, or do the Regulation and the articles of association completely pre-empt national law?[3] In other words, if the Regulation touches upon a certain topic, without imposing certain rules, does this preclude national law from regulating that topic? **This view would clarify in the EU Inc. Proposal that national law cannot provide supplemental rules to protect shareholders and other stakeholders if the Regulation or the articles of association have already regulated the matter with rules that protect shareholders and other stakeholders.** National law should be able to further implement and clarify the Regulation, as well as to regulate matters not covered by the Regulation at all, but it should not be able to systematically gold-plate the Regulation. If there are matters that the EU legislator believes should be better left to Member States to regulate, the Regulation should contain a provision stating explicitly that such matters are to be governed by national law. To avoid legal fragmentation, however, such matters should be kept to a minimum.

Third, it is unclear to what extent the articles of association rank above national law. Article 4 states that national law only governs if the matter is not covered by the Regulation or the articles of association. Article 7 of the EU Inc. Proposal states that *"the articles of association shall cover at least the matters laid down in this Regulation, as specified in the Annex"*. This seems to imply that the articles of association may also cover other matters, and that this pre-empts national law on the matter. In that case, the articles of association would override mandatory national law, unless the Regulation would prohibit the matter from being regulated in the articles of association, or if the Regulation would

[3] For example, article 67 stipulates that the general meeting decides on the issuance of new shares, unless the articles of association authorize the board of directors to decide on the issuance. Does the presence of this rule imply that Member States cannot impose additional rules to protect shareholders, such as a rule that the authorization can only be valid up to a certain percentage of capital or for a certain maximum duration?

explicitly delegate the power to regulate a matter to national law.[4] **This view would consider it desirable that the articles of association pre-empt and override national law, but notes that this should be stated more clearly and explicitly in the text of Article 4.** This point is especially significant in relation to national rules that implement mandatory provisions of EU Directives. In the absence of an explicit provision in the Regulation, we anticipate a strong tendency among national courts and authorities to assume that the articles of an EU Inc. must conform to the rules of national law that implement the EU Consolidated Company Law Directive. In this view,this would be an undesirable outcome: in areas where the Regulation grants the articles scope to operate, they should be capable of departing from the mandatory rules contained in the EU harmonisation directives. Without an explicit provision to this effect, however, this position is unlikely to prevail in national practice.

Fourth, it will not always be easy for Member States to designate a relevant national form, the rules of which apply if the Regulation and articles of association do not regulate a matter, as required by Article 4 of the EU Inc. Proposal.[5] Member States could designate one company form to be the relevant form for some rules, and another for other rules, but this would not help to ensure simplicity and legal certainty. **This view therefore proposes that the text of Article 4 is amended to allow Member States to draft rules that apply specifically to EU Inc. companies with their registered office in that Member State, which would supplement the Regulation and the articles of association, rather than simply referring to a specific national company form.** Such rules may contain references to rules applicable to other national company forms, or rules drafted specifically for the EU Inc., at the Member States' discretion.

The other view is that the Regulation should more comprehensively regulate the EU Inc. through an elaborated "European company code" dealing with, on top of enhanced creditor protection, topics resolving around the rights and protection of shareholders, as set out under section III above. However, the proponents of this view are fully aligned on the necessity to clarify the relationship between the Regulation and national law. They only point out that the influence of national law will naturally decrease to the extent the Regulation is completed with additional mandatory and/or default rules on the rights and obligations of shareholders and on governance — which they consider to be the better option. Moreover, if the Regulation's content is kept to the bare minimum as currently envisaged, many of the topics not dealt with in the Regulation itself risk coming back onto the table when discussing the content of the templates.

That said, the proponents of this view fully agree that the EU Inc. should not develop into 27 different legal forms, depending on the location of its registered seat. They are therefore in agreement with the suggestion that the Regulation should clearly state which rules are mandatory and which are suppletive only, but not with the suggestion that the provisions relating to shareholder rights and governance of the EU Inc. should systematically stipulate that the articles of association may deviate from and

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[4] This seems to be the case in article 44(4) EU Inc. Proposal, which states that *"the liability of directors shall be further governed by the applicable national law"*. This seems to preclude the articles of association from regulating directors' liability, unless applicable national law would allow this.

[5] For example, the EU Inc. may still have a capital (even if there is no minimum capital), while the Belgian private limited liability company (the "BV" in Dutch and "SRL" in French) has abolished the concept of capital, even though the rules of this company form would apply most naturally to the EU Inc. to supplement the Regulation.

supplement the Regulation. They are aligned on the fact that national law cannot interfere with matters dealt with in the Regulation, and on the principle that the articles of association pre-empt and override national law, unless the Regulation itself explicitly leaves a matter to national law. Finally, they also accept that Member States would be allowed to draft specific rules for the EU Inc. supplementing the Regulation.

V. V. EU templates for articles of association and shareholder agreements

Article 8 of the EU Inc. Proposal mandates that EU templates for standard articles of association will be established. We believe that such templates are crucial for the success of the EU Inc. Proposal, it being understood that their importance is largely determined by the completeness of the Regulation: the more minimalistic the Regulation, the greater the importance of the templates.

Either way, such templates can serve three functions.

First, use of the templates facilitates fast-track formation of an EU Inc. Article 16 provides for formation within 48 hours at a maximum cost of EUR 100 if the EU templates are used, whereas the deadline is five working days (and without a cost limit) if the templates are not used. Second, the templates can help reduce transaction costs, by providing standard clauses that founders can easily adopt, without incurring drafting costs. Third, the templates can contribute to legal certainty that the provisions in the articles of association are valid and enforceable if they are included in the template, particularly if the Regulation were to include a safe harbour, as some of the undersigned propose below.

These three functions for the templates partially overlap but sometimes require a different approach. In our view, it could be useful for the EU to **recognise at least two different sets of templates for the articles of association**: one simple, "bare-bones" template for wholly owned subsidiaries and start-ups and other companies that have just been formed and are not looking to attract outside capital immediately; and one more sophisticated template for firms that aim to attract venture capital or private equity in the short term. Trying to serve both audiences with a single set of templates could lead to disappointment. Wholly owned subsidiaries and simple start-ups are mainly looking for a template that is quick and easy to use, available off-the-shelf, and allows for fast-track formation (the first function). For VC-backed start-ups, it is more important that the templates reduce transaction costs and provide legal certainty (the second and third functions), especially concerning the relationships among investors and between investors and management. Such firms will still need to be able to make certain choices in their articles of association that require more tailoring (for example, how many classes of shares to include in the articles of association, and with what rights).

In our view, it is important that the templates are **produced by diverse groups of experts consisting predominantly of experienced legal practitioners** (and perhaps also representatives of (VC) investors with experience of legal drafting). These expert groups should be different for the different sets of templates suggested above. We believe that it would be undesirable to assign the drafting task to one or two law firms or consultants selected through a tender procedure. Attention is also drawn to the fact that not only individual clauses, but also their combination into a single set of articles of association, requires skilful consideration.

Furthermore, the **view** in support of a minimalistic Regulation suggests that the EU Inc. Proposal should contain an explicit **safe harbour** — absent from the current draft — to the effect that **where provisions in the articles of association are included in the relevant EU template, those provisions are valid and enforceable, overriding national law, including doctrines developed by national courts**.[6] Such a provision would constitute a meaningful safe harbour and would be, so this view holds, essential to the coherence and practical utility of the EU Inc. As a reminder, **this is much less necessary in the view supporting a more comprehensive Regulation, as the Regulation would then itself provide such legal certainty**. However, the principle of some form of safe harbour is acceptable to those adhering to this view as well.

The Repasi Report of the European Parliament and the scholarly contributions of Enriques, Nigro, and Tröger[7] have proposed that the **EU should also provide a template for shareholder agreements**. The argument advanced in support of this proposal is, for some of the undersigned, persuasive: in venture capital transactions, there is a close and well-documented interaction between articles of association and shareholder agreements. The shareholder agreement is often considered the most commercially important document. Under the current EU Inc. Proposal, shareholder agreements remain governed by national law, which may render various provisions that reflect common market practices unenforceable in some Member States, because they deviate from national mandatory rules. In particular, the enforceability of voting agreements — where shareholders agree to vote in favour of certain future decisions (which may be defined with more or less detail in the shareholder agreement) — is regulated very differently across Member States. The proponents of this view therefore propose that the EU Inc. Proposal should contain a few basic rules on the validity of shareholder agreements and that the EU should provide a **template for shareholder agreements, with a similar safe harbour such that provisions of the shareholder agreement included in the relevant EU template are in principle valid and enforceable**, as proposed above for the articles of association. The templates should be drafted by similar expert groups as noted above. Drafting templates for shareholder agreements will not be easy, as such agreements need to be tailored to the specific circumstances, sector, and funding stage of each transaction, but certain clauses do recur across the vast majority of agreements. The main advantage of the template would be the safe harbour. Once more, a more complete Regulation will lessen the need for an extensive template.

For some of the undersigned, inspiration for the content of such templates for articles of association and shareholder agreements can be found in the model legal documents drafted by the National Venture Capital Association (NVCA), a US non-profit trade organisation representing the interests of VC investors and start-ups.[8] Others warn against relying too much on US precedents.

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[6] See for a more elaborate discussion of this idea: Luca Enriques, Casimiro Nigro and Tobias Tröger, 'Templates in the EU Inc Regulation Proposal' in Roger Kiem, Alexander Sajnovits and Alexander Wilhelm (eds), *Festschrift für Peter O Mülbert zum 70. Geburtstag am 1. April 2027* (De Gruyter Brill forthcoming) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=6777038.

[7] Luca Enriques, Casimiro Nigro and Tobias Tröger, 'Templates in the EU Inc Regulation Proposal' in Roger Kiem, Alexander Sajnovits and Alexander Wilhelm (eds), *Festschrift für Peter O Mülbert zum 70. Geburtstag am 1. April 2027* (De Gruyter Brill forthcoming) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=6777038.

[8] These documents are available on the website of the NVCA: https://nvca.org/model-legal-documents/.

VI. The Role of national courts and the risk of fragmentation

The Court of Justice of the European Union will inevitably play a role in interpreting the Regulation, which is to be welcomed. National courts, however, will remain the primary arbiters of disputes arising in the application of EU Inc. rules, and this in itself creates a serious risk that the Regulation will give rise to 27 distinct national variants rather than a single, coherent regime. In a number of European jurisdictions, courts have developed general doctrines that affect the validity of contractual arrangements in articles of association and shareholder agreements.[9]

In our view, the creation of a single EU Inc. court with competence to adjudicate all governance disputes concerning the EU Inc. would be the most desirable solution, but this is probably unrealistic. In many Member States there would be constitutional objections to such a proposal, and the political resistance would likely be insurmountable. We therefore consider that other mechanisms must be explored to limit the distorting influence of national courts on the uniformity of the regime.

The view of some is that this problem will largely resolve itself to the extent the Regulation is more comprehensive — as they believe should be the case — and that these rules take priority over national law.

The proponents of a minimalistic Regulation put forward that significant progress can be achieved through the combination of two complementary approaches. First, and as argued above in connection with Article 4, the Regulation should make clear that articles of association override national law and that template articles of association and shareholder agreements are valid and enforceable, despite national court-developed doctrines (the safe harbour).

Second, in this view the Regulation should directly outlaw, in express terms, certain recurring national doctrines that are particularly liable to undermine contractual arrangements in articles of association and shareholder agreements.[10] Generally speaking, this view holds that there is no reason, in private companies, for mandatory rules in the Regulation or in national law that limit the freedom of shareholders to strike deals concerning shareholders' claims to cash flows generated by the company. The Regulation should contain no mandatory rules on this, and the articles of association and possibly also shareholder agreements should be allowed to override any rules and doctrines from national law that would be applicable to other company types.

VII. Technical observations

We conclude with several technical observations that deserve attention, though we acknowledge that a full review of the Regulation's technical provisions requires more extensive examination than the present paper can provide.

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[9] In the Netherlands, for example, the overriding principle of "reasonableness and fairness", which constitutes an open statutory norm, empowers courts to intervene in company affairs — particularly in matters of governance — and to override even mandatory statutory provisions. Similar doctrines exist, in various forms, in other Member States.

[10] A prominent example are doctrines on "leonine clauses" that courts in several Member States use to undermine the enforceability of certain profit-sharing agreements or "bad leaver" clauses.

- The provisions on directors' duties appear to offer room for improvement and greater elaboration, and we would welcome a more comprehensive treatment of this issue in the final text. The same is true for provisions regarding other remedies against decisions by corporate bodies, such as claims for suspension or annulment of corporate decisions.
- Article 7 on the articles of association should be clarified so that Member States are allowed to accept that the articles of association may be drawn up only in *"a language customary in the sphere of international business and finance"* (i.e. English), even if this is not a national language. Otherwise, this provision may make the incorporation of an EU Inc. more difficult in Member States where English is not a national language, even if that Member State does not consider the use of a national language to be necessary. Indeed, under the current draft of the Proposal it appears mandatory to draft the articles of association in two languages, namely a national language and English. From a cost perspective — and in the fight against red tape — this is unattractive.
- The undersigned do not share a common view on Article 52 concerning the withdrawal of shareholders. All of the undersigned believe that the Commission should also consider adopting rules for the exclusion of shareholders who are responsible for oppressive behaviour. However, some consider that withdrawal as well as exclusion should be governed by mandatory rules, while accepting that the articles of association may provide for alternative dispute resolution mechanisms alongside such procedures and may determine the valuation method. Others take the view that all rules on withdrawal and exclusion should be non-mandatory, in order to allow companies to organise their own dispute resolution mechanism replacing the mechanism in the Regulation.
- In any event, it should be clarified in Article 52 that the company can only purchase the shares of withdrawing shareholders if the conditions for distribution under Article 72 are met.
- We support the possibility in Article 60 for an EU Inc. to list on a multilateral trading facility, as well as on regulated markets if the Member State allows this. We note that the Regulation would ideally contain the additional rules that would apply to an EU Inc. listed on a multilateral trading facility or regulated market, taking inspiration from rules harmonised by the Shareholder Rights Directive and Takeover Directive, for example. However, in the absence of harmonisation of the rules applicable to listed EU Inc. companies, the Regulation should at least clarify that Member States can impose additional requirements on such listed EU Inc. companies. Listed companies should be subject to stricter mandatory governance requirements.
- The Societas Europaea (SE) should be accorded the same status as a national public company for the purposes of the EU Inc. framework and should be included in the relevant Annex of the Regulation. It would be absurd, in our view, if a SE could not establish an EU Inc. as a subsidiary in another Member State. Under the present draft, it is highly debatable whether this would be permitted.
- The Commission should not underestimate the timeframe needed to adapt national registration and disclosure systems to the requirements of the "once-only" principle. The Commission must therefore be realistic about implementation timelines and must build sufficient time into the transitional provisions of the Regulation.
- Finally, we also urge the Commission to further assess the compatibility of the EU Inc. Proposal with the EU anti-money laundering framework, especially with the AMLR and the 6th AMLD.

To preserve the legitimacy of the EU Inc. and its access to capital in the EU, abuse of the flexibility offered by this new corporate form as a vehicle for money-laundering operations should be avoided at all costs.

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