EDITORIAL

The 28th Company Law Regime: A Mix of Harmonization and Regulatory Competition

Tom Vos*

These days, it is hard to attend a European corporate law seminar or conference and not hear anything about the 28th company law regime. Every European corporate lawyer seems to be talking about the 28th company law regime. But are we talking about the same thing when we talk about a 28th regime? What problems can a 28th company law regime solve? And what should a 28th company law regime look like? Those are the questions I will explore in this editorial.[1]

1 Problems for innovative European companies

The idea of a 28th company law regime recently resurfaced in the Draghi report, as a solution to address the EU's problems with its capital markets. The Draghi report argues that the EU has failed to build a financing ecosystem capable of supporting innovative, high-growth companies. Venture capital markets remain thin, and European companies continue to depend disproportionately on bank lending. One major obstacle to developing deeper capital markets lies in the fragmentation of company, insolvency, tax laws across the twenty-seven Member States. Therefore, the Draghi report proposed a 28th company law regime to reduce this fragmentation.[2] The Letta report similarly argued for a 28th regime provided by a European Business Law Code.[3]

As noted by Paul Oudin,[4] fragmentation is only one of several problems facing innovative European companies. A first problem is insufficient flexibility for such companies. Many national company laws of European Member States still impose significant legal constraints on the structuring of venture capital transactions, as has been shown by the work of Luca Enriques, Casmiro Nigro and Tobias Tröger.[5] In several European jurisdictions, it is apparently impossible to implement some financing and governance arrangements that are market practice (and arguably economically useful) in US venture capital transactions.

A second problem concerns red tape. In many European countries, incorporating and registering a company remains a time-consuming and cumbersome process, and digital tools are not always widely available.

The third problem is legal fragmentation, which implies that investors and entrepreneurs operating across borders must navigate divergent rules concerning incorporation, corporate governance, share issuances, stock options, shareholder agreements, … The first two problems, the lack of flexibility and the excess of red tape, also reinforce the fragmentation problem, as investors and companies must do legal due diligence in each Member State to comply with the different administrative requirements and to seek legal guidance on whether standard agreements used in US venture capital transactions are legally possible in that Member State.

These problems collectively increase transaction costs and prevent the integration of European capital markets – precisely the issue that the Draghi report urges Europe to confront.

Notes

* Assistant prof. Maastricht University; Visiting prof. University of Antwerp; Research Fellow KU Leuven; Attorney Linklaters LLP. Email: tom.vos@maastrichtuniversity.nl.

1 Some of the thoughts below are based on a position paper on the 28th regime by the Belgian Centre for Company Law, which was submitted to the consultation of the European Commission, and which I co-authored. The position paper can be consulted on this website, https://bcv-cds.be/2025/09/26/contributing-to-the-future-of-european-company-law-2.

2 Mario Draghi, *The Future of European Competitiveness. Part B – In-depth Analysis and Recommendations* 315 (2024), https://commission.europa.eu/document/download/ec1409c1-d4b4-4882-8bdd-3519f86bbb92_en?filename=The%20future%20of%20European%20competitiveness_%20In-depth%20analysis%20and%20recommendations_0.pdf ('a voluntary 28th company rulebook harmonising key aspects of corporate law, insolvency, labour law and taxation could be explored under enhanced cooperation by willing Member States').

3 Enrico Letta, *Much More than a Market* 109 (2024), https://www.consilium.europa.eu/media/ny3j24sm/much-more-than-a-market-report-by-enrico-letta.pdf.

4 Paul Oudin, *The Promises and Perils of a 28th Regime for European Innovative Companies*, Oxford Business Law Blog (2 Oct. 2025), https://blogs.law.ox.ac.uk/oblb/blog-post/2025/10/promises-and-perils-28th-regime-european-innovative-companies.

5 Luca Enriques, Casmiro Nigro & Tobias Tröger, *Venture Capital Contracting as Bargaining in the Shadow of Corporate Law Constraints*, ECGI Law Working Paper No. 833/2025 (2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5183235.

EUROPEAN COMPANY LAW JOURNAL, Volume 23, Issue 1

2 Combining harmonization and regulatory competition through a 28th regime

To address these problems with fragmentation in Europe, two basic solutions are possible: harmonization or regulatory competition. Each comes with their own advantages and disadvantages. Below, I will argue that a 28th regime can be seen as a combination of harmonization and regulatory competition.[6]

Harmonization has long been the EU's preferred instrument for overcoming legal fragmentation, as illustrated by the harmonization brought by the company law directives, now codified in Directive 2017/1132. In an ideal world, such harmonization can bring legal certainty and uniformity, remove barriers to cross-border operations and establish a true single market. Reality falls short of the ideal world, however: in company law, harmonization has often been only partial, with many choices left at the Member State level, so that fragmentation and costs of seeking local legal advice remain. In addition, even in case of maximum harmonization or uniform rules in a regulation, practical application may still differ throughout Member States, due to differences in judicial interpretation and in enforcement by financial supervisors. Some key topics have also proven too sensitive for EU harmonization (despite several attempts), such as group law, takeover defences, fiduciary duties of directors, board structure, co-determination, … Another disadvantage of harmonization is that it may not always lead to the best solution. The European legislature (like national legislatures) is not perfect, and if the outcome of harmonization would be a suboptimal regime for everyone, a lack of harmonization may be preferable. An example is perhaps the regime for legal capital originating from the Second Company Law Directive: once seen as the pride of the European model of corporate law and a great success of EU harmonization, it is now often criticized as an outdated way of protecting creditors.[7]

The alternative solution to fragmentation is to allow for regulatory competition, with EU Member States competing to attract incorporations by offering the best company law regime. Roberta Romano called regulatory competition the 'genius of American corporate law'.[8] In the US, Delaware is the winner of the regulatory competition and provides a de facto harmonized regime, with many corporations in other states choosing to incorporate in Delaware, and many other states choosing to copy Delaware's approach (although recent events in the US have led to renewed competition for Delaware from Nevada and Texas[9]). The Delaware example illustrates that harmonization is not necessary to overcome fragmentation.

The problem with this solution is that the competition for incorporations in the EU is rather tame. One explanation is legal: the EU lacks a true 'internal affairs doctrine', as in the US, that stipulates that the internal affairs of the company (including its governance and share structure) are governed by the law of its incorporation state.[10] More importantly, practical, cultural, language and tax barriers make it difficult for EU businesses to incorporate in another Member State.[11]

Part of the argument for a 28th company law regime is that it can combine some of the advantages of harmonization and regulatory competition. Like harmonization, it offers a uniform framework throughout the EU. However, if the solution included in the 28th regime is not the one companies want, they can still opt for one of the twenty-seven national regimes – preserving the benefits of regulatory competition. If done well, a 28th regime with high levels of flexibility and low levels of red tape, could even be the instigator for further competition among Member States, as the 28th regime could remove practical and language barriers to choosing for another corporate law regime than the home Member State of the business. A 28th regime may also be easier to implement politically than full harmonization: it does not force countries to abandon corporate law provision that they deem superior.

Of course, there are also disadvantages to the 28th regime. Previous attempts of creating European corporate forms have either failed to be adopted (like the SPE or the SUP) or failed to become popular (like the SE). A 28th regime may face similar obstacles, also depending on its level of ambition, as explained below.

Notes

6 This characterization is inspired by the following article: Luca Enriques, *Regulatory Barriers and the Quest for an Integrated European Market for Innovation*, Oxford Business Law Blog (27 Oct. 2025), https://blogs.law.ox.ac.uk/oblb/blog-post/2025/10/regulatory-barriers-and-quest-integrated-european-market-innovation. In contrast to Enriques, however, I *see* a 28th regime not simply as harmonization, but as a combination of harmonization and regulatory competition.

7 Out of many: John Armour, *Legal Capital: An Outdated Concept?*, 7 EBOR 5 (2006), doi: 10.1017/S156675290600005X.

8 Roberta Romano, *The Genius of American Corporate Law* (AEI Press 1993).

9 Matthew A. Schwartz, James M. Shea Jr. & William S. L. Weinberg, *Summary of Recent Changes to Delaware, Nevada, and Texas Corporate Law*, Harvard Forum on Corporate Governance (5 Jul. 2025), https://corpgov.law.harvard.edu/2025/07/05/summary-of-recent-changes-to-delaware-nevada-and-texas-corporate-law/.

10 Making a similar point: Oudin, supra n. 4. However, the possibility for EU Member States to impose their own laws on companies incorporated in other Member States has been limited by the CJEU in cases such as *Centros*, *Inspire Art* and *Edil Work 2*. In addition, the contours of the internal affairs doctrine in the US are not crystal clear either, as states (such as California) have in the past tried to impose corporate governance requirements on out-of-state corporations.

11 *See* for a discussion: Luca Enriques, *EC Company Law and the Fears of a European Delaware*, Eur. Bus. L. Rev. 1259 (2004), doi: 10.54648/EULR2004058.

3 The bold versus the cautious approach to the 28th regime

If a 28th regime wants to maximally reduce red tape and legal fragmentation, it should consist of a stand-alone pan-European fully digital corporate form, with a comprehensive companies code established by an EU regulation, enforced by a single specialized EU court, and with harmonization of certain key provisions of insolvency, employment and tax law. Such a bold approach to the 28th regime is what has basically been proposed by EU-INC, a community within the European start-up ecosystem that has drafted elaborate and ambitious proposals for a 28th regime.[12] However, this approach would most likely require unanimity within the Council,[13] making it politically unlikely that such an ambitious proposal would be adopted.

An alternative to the fully fledged 28th regime is the more cautious proposal put forward by the European Parliament.[14] This proposal envisages a European 'label' attached to existing national corporate forms, which must meet certain harmonized requirements. This approach is markedly less ambitious: it would in practice yield twenty-seven national variants of an optional regime, each embedded in existing national corporate forms. In that sense, it actually resembles the traditional harmonization approach, although it shares with the 28th regime the feature of optionality: firms may still choose a different national company form if they prefer it to the harmonized version.[15] Several authors have argued that such a limited harmonization could nevertheless deliver meaningful benefits: by simplifying company law rules in specific areas, it could provide firms with greater contractual flexibility, reduce administrative burdens, and mitigate at least some of the legal fragmentation that currently characterizes the Union.[16]

Whatever level of ambition ultimately prevails, it is crucial that any 28th regime – whether bold or cautious – remains targeted at the three core problems identified above: increasing flexibility, cutting red tape, and reducing legal fragmentation.[17] This implies, first, that the regime must offer the flexibility required for venture-capital transactions. The experience of the Belgian and Dutch BV can provide inspiration: a private company form without legal capital (in Belgium) or with a symbolic minimum capital (EUR 0.01 in the Netherlands), offering extensive contractual freedom and highly adaptable governance structures.[18] Second, administrative burdens can be reduced if the 28th regime would offer digital incorporation and digital meetings, filings in a pan-European corporate register, and the availability of English for corporate documentation. Third, to reduce fragmentation, the 28th regime should harmonize company law to the extent politically feasible, designate the law of the registered office as the applicable law, and undertake limited but meaningful harmonization in neighbouring fields – particularly the connecting factors in employment, tax, and insolvency law. To ensure a common judicial interpretation of the 28th regime, the EU could also create an optional EU-wide arbitration mechanism, and/or require Member States to set up specialized national courts for 28th-regime companies, both operating with the possibility of English-language proceedings.

Many of these proposals remain ambitious, and even the more cautious approach suggested by the European Parliament may still fail. Should political agreement in the EU prove unattainable, a smaller group of at least nine Member States may ultimately resort to 'enhanced cooperation', as the Draghi report has suggested,[19] and create an optional cross-border corporate form among them. Several Member States, including Belgium and the Netherlands, have already modernized their company laws to offer highly flexible limited liability corporate forms, yet practical barriers to cross-border incorporation continue to limit their uptake. A genuinely cross-border company form may help overcome these lingering obstacles and finally deliver the capital markets that European companies urgently need.

Notes

12 *See* the website of EU-INC, https://www.eu-inc.org.

13 A company law regulation would need to be based on Art. 352 TFEU, which requires unanimity within the Council.

14 European Parliament Committee on Legal Affairs, *Draft Report With Recommendations to the Commission on the 28th Regime: A New Legal Framework for Innovative Companies*, 2025/2079(INL) (30 Jun. 2025), https://www.europarl.europa.eu/doceo/document/JURI-PR-773199_EN.pdf.

15 Such optionality is actually also often present in traditional harmonization of EU company law, which often only applies to certain corporate forms, such as public limited liability company forms, leaving Member States free to create new corporate forms not subject to EU harmonization. The cautious approach to the 28th regime is therefore functionally very similar to the traditional approach to harmonization of company law in the EU.

16 Oudin, supra n. 4; Enriques, supra n. 6.

17 The proposals in this paragraph are based on the position paper on the 28th regime by the Belgian Centre for Company Law, which was submitted to the consultation of the European Commission, and which I co-authored. The position paper can be consulted on this website, https://bcv-cds.be/2025/09/26/contributing-to-the-future-of-european-company-law-2.

18 Of course, there are some exceptions. One aspect of Belgian corporate law that is particularly cumbersome for venture capital transactions is the very strict procedure for variation of class rights, which in practice creates veto rights for many minority shareholders that hold a separate class in further financing rounds. *See* for a discussion of this problem: Marieke Wyckaert, *Classes of Shares in the Belgian Private and Public Limited Liability Company: A Search for a Reasonable Balance Between Collective and Invidiual Interests*, ECFR 61 (2023), doi:10.1515/ecfr-2023-0008.

19 Draghi, *supra* n. 2, at 315.