FREEDOM OF ESTABLISHMENT AND COMPANY LAW IN THE EU: LESSONS FROM THE 28TH REGIME PROPOSAL

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I. INTRODUCTION

The proposal for a 28th regime in company law (EU Inc) is attracting considerable interest. It is still too early to know whether the proposal will go ahead; but if it does, it may bring about a significant transformation of the company law of the EU Member States, at least as regards small and medium-sized enterprises. The ease of incorporation, the possibility of using model articles of association, the requirement that those articles be drafted, in addition to an official language of the state of registration, in a language customary in international business (English, even though this language is not specifically mentioned), as well as the absence of a mandatory share capital, the rules on shares and the provisions on insolvency, make the proposal highly interesting material for anyone concerned with company law or, more generally, with international trade.

In this brief comment, however, I will deal only with one aspect of the Proposal that has caught my attention: the way in which it puts an end to the parallel evolution that European company forms and national company forms have followed for almost three decades as instruments for cross-border corporate operations. The action of the European legislature, through the creation of the European Company (SE) and the European Cooperative Society, has interacted, in practice, with the case law of the Luxembourg Court on freedom of establishment, which removed the limits that constrained the use of national-law companies in cross-border corporate operations. The result has been competition not only between the different company types provided for in the laws of the EU Member States, but also between these and the European company forms. The EU Inc could put an end to this anomalous situation. The idea of superseding national laws is thus transformed into that of harnessing those national laws to implement the changes needed to facilitate the (domestic and international) activity of small and medium-sized enterprises. This is what we will examine in the following sections.

A preliminary caveat: although the name "European Union" has only existed since 1993, and coexisted with that of "European Community" until 2009, I will always use the current name, even when referring to earlier periods. The inevitable lack of rigour this entails is justified by the attempt to achieve greater clarity.

II. THE 28TH REGIME PROPOSAL

In March 2026, the European Commission presented its proposal for a "28th regime" in company law [COM(2026) 321 final]. According to the text itself, the proposal seeks to meet the need for an adequate framework enabling small and medium-sized enterprises to extend their activity beyond national borders within the EU, in line with the Letta report on the future of the single market (European Council, 2024). The path chosen is not the creation of a European company, that is, one directly linked to EU law, but rather a harmonised company form to be incorporated into the legal systems of all Member States.

This is a departure from the model followed for decades. Initially, the EU had sought to facilitate cross-border corporate operations through forms created directly by EU law (the Societas Europaea, the European Cooperative Society and the European Economic Interest Grouping), which stood in opposition to national company forms. The 28th regime company (EU Inc) does not compete with national companies; it takes its place among them.

The EU Inc is to be a national-law company, with limited liability and legal personality; it will also have a single European identifier, without the need to use multiple identifiers depending on the country in which it operates. It may be formed by one or more natural or legal persons, either *ex nihilo* (in the expression used by the proposal) or by means of a conversion, merger or division (Art. 3). No share capital is required (Art. 62), so shares need not have a nominal value, although the articles of association may provide for one (Art. 61). And while both the registered office and the central administration must be located within the EU (Art. 9), they need not be in the same state: the founders are free to choose where to incorporate the company.

The regulation also extends to the formation of the company (Arts. 13 et seq.), the creation of branches (Arts. 36 et seq.) and subsidiaries (Art. 19) and employee participation (Art. 12), among other matters. A fast incorporation procedure is envisaged, with the option of using the model articles of association contained in the proposal itself (Art. 8). The articles must be drafted in one of the official languages of the Member State of registration and in a language customary in the sphere of business (Art. 7.4). Although English is not mentioned, it is clear that this is the language referred to (Schmidt and Teichmann, 2026, 15), as shown by Art. 27 of the Prospectus Regulation, which uses the same concept.

The proposal further requires that procedures concerning these companies can be carried out online (Art. 10), including incorporation by means of a harmonised application form (Art. 13), with a fast-track procedure through the EU central interface under which the pre-registration checks are to be completed within no more than 48 hours and at a cost not exceeding 100 euros (Art. 16).

The Regulation also covers the disclosure requirements of EU Incs and their branches, powers of representation and their effects in other states, the organisation and representation of the company, directors' duties, related-party transactions, the rules on shares, including their transfer, and winding-up and insolvency proceedings. Matters not provided for in the Regulation will be governed by the company's articles of association and, failing that, by the national law of the state of the registered office applicable to the relevant company form, that is, the national form taken as the reference for the EU Inc. There seems little doubt that the Regulation has in mind one of the already existing forms (Schmidt and Teichmann, 2026, 11-12), although in my view nothing would prevent that relevant form from being created "ad hoc". In any event, it is taken for granted that the rules of the Regulation and of the articles will have to be supplemented by domestic law, which means that private international law remains necessary in relation to this company type (Schmidt and Teichmann, 2026, 10).

In the following sections, we will examine how this regulation fits into the evolution of company law in the European Union and how it interacts with freedom of establishment and the case law that has shaped it.

III. FREEDOM OF ESTABLISHMENT OF COMPANIES IN THE EU

1. Freedom of establishment without regulatory competition

During the second half of the twentieth century it was taken for granted that companies formed under the law of one EU Member State might not be recognised in another Member State. Indeed, there were cases in which, for example, the registration of branches in states other than the state of incorporation was refused (Arenas García, 2000, 142). The provisions on freedom of establishment did not extend to the recognition of foreign companies.

The EU institutions addressed this problem by designing European company forms. If the recognition of national companies raised difficulties, these were overcome through company forms belonging to the EU rather than to any particular Member State. The Societas Europaea (SE), created by Regulation 2157/2001, is an example of this, the outcome of an evolution spanning several decades that began with academic proposals in the early years of the EU (Thompson, 1968, 183-184) and continued with several Commission proposals during the 1970s, 1980s and 1990s (Sanders, 1976; Rasner, 1992; Blanquet, 2002; Teichmann, 2002, 21-34).

The result is consistent with an approach in which domestic company forms are ill-suited to international operations and companies are incorporated in the country where they will mainly carry out their activities. It is business reality that determines the state of creation of the company and, therefore, its legal regime, without any regulatory competition. This absence of competition is key to understanding the logic of the SE: European company forms would be the appropriate vehicles for transnational operations within the EU, since they do not face the specific recognition difficulties suffered by national companies. Recital 3 of Regulation 2157/2001 puts it clearly: “The completion of restructuring and cooperation operations involving companies from different Member States gives rise to legal and psychological difficulties and tax problems”.

This approach, however, was profoundly affected by the case law of the Luxembourg Court. Two years before the publication of Regulation 2157/2001, the Centros judgment laid the foundations of the obligation to recognise, in each Member State, companies incorporated under the law of another Member State. The difficulties for which the SE had been designed had largely ceased to exist, so that competition between domestic companies and the SE became a mere comparison between regimes. This probably explains why in several countries few SEs are formed and why, in the case of Germany, where their number is significant, the attraction of this form owes more to the desire to escape rigid systems of corporate organisation (Schmidt and Teichmann, 2026, 3) than to its advantages for international operations.

2. Freedom of establishment and regulatory competition

The Centros judgment, just mentioned, and those that followed completely transformed the corporate landscape in the EU (Gerner-Beuerle, Mucciarelli, Schuster and Siems, 2019, 3-8). By introducing the obligation of recognition, the Luxembourg Court also introduced competition between the company laws of the EU. It is true that this competition did not produce the results that in the United States led to the so-called "Delaware effect" (Gelter, 2005; Kieninger, 2005), since linguistic and cultural difficulties limited relocation in search of the "better law"; but it did exist, as shown by a certain "flight" of companies with their real seat in Germany towards the United Kingdom (Ringe, 2013, 236-238). In any event, the SE was no longer indispensable for cross-border operations, and a twofold competition emerged: between the different national company forms, on the one hand, and between these and the European forms, on the other.

The latter faced certain disadvantages. Among them, that it was not possible to locate the registered office of the SE outside the state of its central administration (Art. 7 of Regulation 2157/2001); if the two became dissociated, the SE could even be wound up (Art. 64). The paradox thus arose that national-law companies could prove more flexible and effective instruments than the European forms themselves for structuring transnational corporate operations.

The advantage of national-law companies was accentuated when the Luxembourg Court, in Cartesio, VALE and Polbud, established cross-border conversion as a further manifestation of freedom of establishment. Under this doctrine, companies incorporated under the law of one Member State may convert into companies governed by the law of another Member State, and the state of origin cannot prohibit this. In principle, as stated in Cartesio, the law of the host state had to authorise the operation; but VALE qualified this statement: if the law of the host state allows conversions within the country, it must also allow them from another Member State. Moreover, once the conversion has taken place, the authorities of the state of origin are obliged to regard the company as governed by the law of the host state (Polbud). Following this last judgment, the Company Law Directive was amended to include the regulation of intra-European cross-border conversions.

The case law of the Luxembourg Court thus upset the balance between national and European company forms. The 28th regime now proposed by the Commission aims to restore that balance, rebuilding the figure of the European company on the basis of the case law of the Luxembourg Court. We will examine this in the next section.

IV. THE ARTICULATION OF CONFLICT-OF-LAWS AND SUBSTANTIVE SOLUTIONS

1. Real seat theory and incorporation theory in the EU

The previous section began by noting that until the Centros judgment of 1999 it was assumed that Member States could refuse to recognise the legal personality of companies formed under the law of other Member States. This denial of recognition is linked to the real seat theory, one of the two main approaches to the private international law of companies in comparative terms.

The real seat theory stands opposed to the incorporation theory —or the real seat model to the incorporation model, which would be more accurate (Garcimartín Alférez, 2002, 47)— as mechanisms for identifying the law governing the company. Under the incorporation model, the governing law is the one used to create the company; under the real seat model, the *lex societatis* is that of the country where the company has its real seat, usually identified by reference to the central administration, though without excluding other possibilities, such as the principal establishment or the main centre of operations.

The identification of the governing law not only affects the rights and obligations of shareholders and directors, the governance of the company or its capacity; it also conditions the company's recognition. A company incorporated in one country but with its real seat in another will have its legal personality recognised in systems following the incorporation theory, but not in those applying the real seat model, given the dissociation between the state of incorporation and the state of the real seat. In practice this picture admits important nuances, but for our purposes it suffices to underline the relevance of the distinction for the recognition of foreign companies.

The difference between the two theories also has a bearing on substantive company law and, specifically, on the requirements for forming a company: countries following the real seat theory may require the company being formed to have its real seat in the state of incorporation, thus preventing the creation of companies with a weak link to that state. This dimension of the real seat theory is present in the European company forms, since, as noted, the SE cannot locate its registered office in a state other than that of its real seat; this also affects its legal regime, because the law of the state of the registered office applies to matters not provided for in the SE Regulation or in the articles of association (Art. 9 of Regulation 2157/2001), and may also come into play, in some cases, through the national law transposing EU legislation (Art. 9.1.c) i) of the Regulation).

In the case of companies incorporated under the law of a Member State, the case law of the Luxembourg Court requires the incorporation theory to be followed for their recognition in other states: recognition cannot be denied on the ground of a dissociation between the state of incorporation and the state of the real seat (Überseering). It is also required that the law applicable to the company be that of the state of incorporation (Inspire Art and Edil Work) or, where a conversion has taken place, that of the state to which the company has moved (Polbud). However, this case law does not oblige the state of incorporation to allow the dissociation between incorporation and real seat; that is the doctrine to be derived from Daily Mail, as taken up in Cartesio. Nothing therefore prevents Member States from requiring, as a condition for the incorporation of companies under their law, that the real seat be located in the state of incorporation. As we have seen, the European company forms are likewise subject to the requirement that central administration and registered office coincide, which, in turn, affects the law that will supplement the provisions of Regulation 2157/2001.

2. The 28th regime proposal: from conflict as a problem to conflict as a solution

From the foregoing it follows that the combination of a regulation of the European company forms designed at a time when the limitations on the cross-border establishment of national-law companies were considerable, with the doctrine of the Luxembourg Court built from Centros onwards, has led to a situation that can well be described as "strange": in the EU it is possible to choose the state of registration of national-law companies, but not that of the European company forms, with the result that, paradoxically, the former may be more favourable than the latter for cross-border intra-European corporate operations.

This is perhaps the reason why the Commission has opted, for the 28th regime, for a national rather than a European company form. Companies incorporated under the law of the Member States no longer face difficulties for cross-border establishment within the EU, so a European company form is not needed for this kind of operation.

Today, the problem may lie rather in the divergence between national laws. It is true that this divergence fosters regulatory competition, and the 28th regime does not restrict it, since states retain the possibility of creating whatever company forms they see fit; what happens is that a specific form is added which, despite being national, has an extensive common regime, the one resulting from the proposed Regulation. The EU Inc seeks to respond to the needs for flexibility, speed of incorporation and low costs that are appropriate, in particular, for small and medium-sized enterprises, and it fosters competition between countries to attract companies, facilitating establishment wherever the founders prefer and the dissociation between formal seat and economic activity.

In short, the aim is to harness the doctrine accumulated over almost thirty years in order to turn the initial approach (cross-border establishment through European companies) on its head and use national companies for that purpose. In this way, moreover, the legal basis is Art. 114 of the Treaty on the Functioning of the EU (TFEU), on the approximation of national laws, without any need to resort to a legal basis that would require unanimity (Schmidt and Teichmann, 2026, 6-9).

The use of a company form that, though harmonised, is national has, I believe, further advantages. It is faithful to the nature of the Union, which cannot be conceived as a competition between European and national institutions, between EU law and national laws, but must embrace the normative plurality that characterises it. The reference to national laws —relatively frequent in EU law— should not be seen as a lesser evil or a failure (for a different view, in relation to the European Patent with Unitary Effect, Gabriel-Pizarro, 2026, 20-21), but precisely as the translation of the pluriform reality that the EU is. At times, resorting to EU law while disregarding the state reality on which it is built is not a shortcut but a step backwards. The parallel evolution of the European company forms and the doctrine of the Luxembourg Court shows as much. The 28th regime could be the way to bring both evolutions together and seal the gap that had opened between them.

V. CONCLUSION

The 28th regime proposal can be read as the closing of a cycle in the evolution of EU company law. The European company forms were conceived to solve a problem —the recognition of companies incorporated under the law of one Member State in the other states of the Union— which the case law initiated with Centros made disappear. Since then, paradoxically, national-law companies proved more flexible instruments for cross-border intra-European operations than the European forms themselves, still anchored in the requirement that registered office and real seat coincide, characteristic of the real seat model.

The EU Inc draws the consequences of this evolution: instead of setting a European form against the national ones, it takes its place among the latter as a harmonised national form, taking advantage of the freedom to choose the state of registration that the doctrine of the

Luxembourg Court guarantees to national-law companies. This choice has a further significant consequence: it makes it possible to rely on Art. 114 TFEU, on the approximation of laws, avoiding the unanimity that the creation of a new supranational form would require.

The 28th regime shows, in short, that the reference to national law is not a failure of integration, but the normative translation of the pluriform reality on which the Union is built. If the proposal succeeds, the conflict-of-laws and substantive dimensions of company law, which evolved along separate paths for decades, would at last be articulated within a single figure. The conflict of laws, which was the problem, would become part of the solution.

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