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MEETING DOCUMENT

From:	General Secretariat of the Council
To:	Working Party on Company Law

Subject:	Irish Presidency Flash 1 September 2026 - Company Law WP meeting
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Delegations will find attached the Irish Presidency Flash in view of the Company Law Working Party meeting on Tuesday 1 September 2026.

Company Law Working Party: 1 September 2026; Presidency Flash

Our fourth meeting will focus on the following agenda items.

1. Employee participation; and
2. Incorporation theory vs real-seat theory (forum-shopping)

1. Employee participation

Employee participation rules concern the involvement of employees in corporate governance, for instance by the right to elect or appoint members of a supervisory or administrative organ. Some Member States have raised issues regarding how employee participation law would apply to EU Inc's.

This item was first discussed at the 8 July Working Party. The German Delegation circulated a proposal on the eve of that Working Party (WK 10128/2026) and several Delegations stated that further time was necessary to analyse this. The Presidency considers that, almost two months on, this issue is now ripe to move towards decision.

Background

Where an EU Inc. is created *ex nihilo* or by domestic conversion, merger or division, the employee participation rules of the Member State of registration will apply.¹ If the founders choose to register a company in Member State A, but to have their centre of administration and all of their employees in Member State B, then Member State A's employee participation rules will apply.

It is important to underline that this only concerns employee participation. Member State B's law will generally govern other rules affecting the relationship between employer and employee, including most employment law.² Employee participation raises distinct issues because it directly affects corporate governance – which is typically governed by Member State A's law.

This approach already applies to existing companies under the Treaties. If a company formed in Member State A establishes a branch in Member State B, Member State A's employee participation rules will normally continue to apply.

It is true that some Member States apply the real seat theory, and so require that companies' registered office be in the same place they have their business activity or their centre of administration. This includes Member States with employee participation rules. However, they can only apply this to companies formed in their jurisdiction. They cannot negate the freedom of establishment of companies formed in Member States that apply incorporation theory. A founder may create a company in an incorporation theory Member State and then establish a branch in a

¹ Article 12(1). If an EU Inc is created by cross-border conversion, merger or division, then a procedure to determine employee participation rules applies. This is the same procedure as applies to any other company created this way: Article 12(2).

² The rules (which apply to all companies, including EU Inc's) are complicated. The key point is that employment contracts may not derogate from the protection established by the law of the place of habitual work: Article 8 of Regulation 593/2008 (Rome I).



real seat Member State, even if all of her business is conducted in the real seat Member State.³ Whilst it is ‘*not inconceivable*’ that employee protection could justify restricting that right, it cannot justify refusing to recognise a company because it does not follow local employee participation rules.⁴

According to the Commission, Member States’ traditions and legal regimes on employee participation vary considerably. There are different thresholds (for instance, 500 employees in Germany and 25 in Sweden). The way they apply also varies greatly, including on the nomination and number of worker representatives per board. 9 Member States have no rules on employee participation in company boards, and in 6 such rules are limited to certain state-owned companies.

Views

Some Member States who have employee participation traditions have raised concerns that their employee participation rules could be circumvented by EU Incs. In particular, founders could register new EU Inc. companies in a Member State with weak or no employee participation laws whilst only employing individuals elsewhere. Whilst this is already possible under the Treaties, some Member States argue that the EU Inc. will make this more attractive and feasible in practice. The draft Repasi report is also in this vein ([790.143](#) – see Article 12, p.73 et seq.).

Other Member States, including some Member States who have employee participation rules, have not raised this as a concern. Several Member States have expressed concerns that certain solutions would undermine EU Incs’ freedom to operate freely across the internal market, even placing EU Incs at a disadvantage compared with other companies. At the same time, most Member States have expressed openness to a solution that does not undermine that freedom.

The Presidency seeks Delegations’ views on this issue, keeping in mind both the objectives of the EU Inc. (on the one hand) and the importance of this issue for certain Member States and for parts of the Parliament (on the other).

The table below sets out several options that have been proposed. The aim is to get a sense of Delegations’ overall preferences; some of the options may have political, practical and/or legal obstacles. Key:

- ‘MS A’ = Member State of the registered office;
- ‘MS B’ = A different Member State where the EU Inc. has a branch or branches with many employees; and
- ‘foreign company’ = a company from MS A operating in MS B.

Option	Domestically-created EU Incs ⁵	Impact
0 Delete Article 12⁶	• Default rules apply under the Treaties, other secondary law and Article 4 of this Proposal.	• In practice, a similar outcome to Option 1a (COM proposal). • Less explicit than Option 1a. This makes clearer that EU Incs are subject to the same

³ C-167/01 *Inspire Art*, paragraph 95; compare paragraph 138.

⁴ C-208/00 *Überseering* paragraphs 89 and 92-93.

⁵ I.e. created *ex nihilo* or by domestic conversion, merger or division. See art.12(1) EU Inc. Proposal. For EU Incs created by cross-border conversion, merger or division, all of the options currently on the table envisage the same approach: the usual rules under Directive 2017/1132 apply to determine the applicable employee participation law or negotiated rules.

⁶ Several amendments in JURI propose this: [PE791.129v01-00](#), amendments 835-838.

		employee participation rules as any other company: the EU Inc. proposal does not create special exceptions.
1a COM proposal	- MS A's employee participation law applies. - EU Inc. must publish average employee numbers in accordance with national law (Article 26(1)(b)).	- Founders are free to create EU Incs in any of the 27 MSs and to operate across the EU. - This is aligned with the existing Treaty position. Member States may not, in general, impose their employee participation rules on foreign companies. - However, some argue that the EU Inc. may increase of cherry-picking employee participation rules. The EU Inc. is designed to be attractive and to have common corporate rules in all MSs. Moreover, all 27 forms of EU Inc. would use incorporation theory.
1b Possible variation	Same as Option 1a, but add an anti-abuse clause and transparency obligations (e.g. more granular obligations to publish data on employee numbers in each MS annually).	Same as option 1a, but provides some scope to prevent companies abusively circumventing rules and facilitates scrutiny and enforcement by transparency.
2a German proposal	- MS A's employee participation law applies. - However, if an EU Inc exceeds the employee participation threshold in MS B, it must carry out a division by separation, creating a subsidiary under MS B's law. MS B's employee participation law will apply to the subsidiary.	- Founders are free to create EU Incs in any of the 27 MSs and to operate across the EU. - However, this freedom would be limited by employee participation rules. An EU Inc. wishing to employ people across the EU may need to fragment, dividing into several legal persons. - Increases protection of national employee participation rules. MSs could prevent foreign EU Incs from exceeding local employee participation thresholds, which they cannot do for other foreign companies.
2b Possible variation	Same as Option 2a, but the EU Inc. need only establish a subsidiary if its employee number in MS exceeds <u>both</u> 500 <u>and</u> the local employee participation threshold.	Same as Option 2a, but ensures a predictable minimum threshold across the EU market. Mitigates risk of EU Incs being disincentivised from creating branches in MSs with low thresholds. Qualifies the increase in protection of national employee participation rules.
3 Repasi proposal	- The strictest triggered employee participation law (MS A or MS B, or indeed any MS C) applies. - Strictness measured by the proportion of employee representatives on boards. - If the applicable law cannot be determined, then a negotiation procedure based on Directive 2001/86/EC (the Societas Europaea rules) applies.	- Founders are free to create EU Incs in any of the 27 MSs and to operate across the EU. - However, the strictest applicable employee participation law will apply in MS A. - Unlike Option 2, this avoids fragmentation of the EU Inc. However, it may require MS A to apply MS B's employee participation rules. It also risks instability, with the applicable law changing as the employee balance does. - Ensures protection of the strictest employee participation rules. Less strict rules risk being overridden by stricter ones. Member States could impose stricter rules not only on their territory, but on MS A's territory too.
4 Other options?	<i>Delegations are invited to propose any other options.</i>	<i>If your proposal builds on Option 1, please explain how it addresses the concerns of</i>

		<i>Member States that wish to protect employee participation rules.</i> • <i>If your proposal strengthens employee participation rules (like Options 2 and 3) please explain how it is compatible with the EU Inc.'s objectives (creating a form that will operate and scale-up freely across the Union).</i>
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Question 1: Please express your order of preference for Options 0, 1a, 1b, 2a, 2b, 3 and (if applicable) 4 above. Please indicate any anticipated red lines, as well as any specific drafting proposals under Option 4.

2. Incorporation theory vs real-seat theory (forum-shopping)

Background

There appears to be broad support for the basic model of the EU Inc. Under that model:

- The EU Inc. is subject to incorporation theory as regards the specific Member State. Founders are free to incorporate EU Incs in any Member State, even if their centre of administration and their economic activity are mainly in other Member States.
- The EU Inc. is subject to the real seat theory as regards the EU as a whole. The central administration or the principal place of business must be in the EU (see Article 9 and recital 11). (Additionally, at least one director must be resident in the EU (Article 42(2)).

It follows that an EU Inc. could:

- be incorporated in Germany, have its head office in Spain, and do most of its business in the US; or
- be incorporated in Estonia, have its head office in Canada (but at least one director resident in the EU), and do most of its business in central Europe;

but could not:

- be incorporated in Italy yet have both its head office and main business in the UK.

As noted, there appears to be broad support for this model. Amongst other things, it gives flexibility to founders regarding registration. It also ensures a genuine link to the EU whilst allowing EU Incs to thrive globally (for instance, an EU Inc. digital startup may end up with most revenue outside of Europe, so long as its central administration remains here). At the same time, several delegations have expressed concern about 'forum-shopping' and/or possible abuse of the form. A number of safeguards have been proposed in this respect, including in the French non-paper (WK 11129/2026).

Analysis and proposal

In the Presidency's view, it is crucial to distinguish between two things:⁷

⁷ See similarly DG Justice, *Letterbox companies – Overview of the phenomenon and existing measures* (Publications Office of the EU, 2021, <https://data.europa.eu/doi/10.2838/095339>), p.1, distinguishing legitimate from abusive use of so-called 'letterbox' companies.

- Founders' decision to incorporate their EU Inc in the Member State offering the most favourable law and/or business environment (for instance, the most predictable rules on civil litigation). As several Delegations have pointed out, this is a legitimate use of the freedom offered by the EU Inc. form. Founders already enjoy a Treaty right to do this.⁸
- The use of wholly artificial corporate arrangements for the main purpose of evading applicable law, e.g. on taxation, social security or organised crime.⁹

With this in mind, the Presidency proposes the following approach:

- Maintain the EU Inc.'s use of incorporation theory between Member States and real seat theory within the EU as a whole (as in Article 9 of the proposal);
- Add safeguards to ensure that the EU Inc.'s 'real seat' is genuinely in the EU, i.e. that its central administration or principal place of business is here; and
- Strengthen the safeguards regarding abuse via artificial corporate arrangements.

Question 2: The Presidency proposes to maintain the basic model of the EU Inc. (incorporation theory between Member States, but a requirement that the real seat stay within the EU). Do you:

A. Agree; or

B. Disagree? If so, what specific changes would you propose?

Question 3: The Presidency proposes to add safeguards to ensure that the real seat stays within the Union in line with Article 9, such as obligations for the company to report its central administration and principal place of business and for Member States to enforce this. Do you:

A. Agree; or

B. Disagree? If so, what specific changes would you propose?

Question 4: The Presidency proposes to strengthen the safeguards regarding abuse in cases of wholly artificial corporate arrangements, taking Directive 2017/1132's language as a starting point.¹⁰ Do you:

A: Agree; or

B: Disagree?

In both cases, please provide any specific drafting suggestions.

⁸ C-167/01 *Inspire Art*, paragraph 96: '*... the fact that the company was formed in a particular Member State for the sole purpose of enjoying the benefit of more favourable legislation does not constitute abuse even if that company conducts its activities entirely or mainly in [another] State...*'

⁹ Compare C-196/04 *Cadbury Schweppes*, paragraphs 51 and 54.

¹⁰ E.g. art.86m(8-9): '*abusive or fraudulent purposes leading to or aimed at the evasion or circumvention of Union or national law, or for criminal purposes.*'