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CONTRIBUTION

From:	General Secretariat of the Council
To:	Working Party on Company Law
Subject:	Proposal for a Regulation on the 28th Regime – EU Inc. Written contributions from the French delegation

Delegations will find attached written contributions from the French delegation.

Non-paper on the listing of EU Inc.

in the proposal for a Regulation on the 28th regime (EU Inc.)

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I. Introduction and purpose of the non-paper: supporting the EU Inc. throughout its financing journey

In order for the 28th regime to be a practical instrument for deepening the Savings and Investments Union, its legal form should enable European companies to attract the capital they need to grow and scale within the Union. In this respect, EU Inc. companies should have access to a wide range of financing options, including credible exit opportunities for their investors.

However, a company whose shares are publicly traded on a regulated market operates in a fundamentally different way from a private company. Applicable Union and national requirements, including rules on prospectuses, market abuse, transparency, shareholder rights and capital transactions provide safeguards that are necessary to ensure market integrity and investor confidence.

In this respect, dispersed ownership and the liquidity of shares require safeguards embedded in the company's governance, accounting and risk management system itself that differ from the needs of a traditional unlisted startup. National laws therefore generally reserve admission to trading to legal forms whose corporate governance is specifically designed for public markets: in France, for example, companies whose shares are admitted to trading on a regulated market must adopt specific legal forms, such as "société anonyme" (SA), which entail rules on the composition and powers of corporate bodies, the representation shareholders on the board, general meetings, directors' remuneration and statutory audit.

It should also be noted that publicly traded companies—especially large ones—are subject to additional financial and societal requirements as public-interest entities (PIE), including, for example, sustainability reporting (CSRD), due diligence obligations (CS3D), and gender parity on boards (Women on Board), among others.

Therefore, we believe that it would be difficult to devise a single, fully harmonised legal form within the EU that would ensure a quick and simple incorporation process and a secure corporate structure with maximum flexibility, while also regulating all aspects of subsequent operations as a publicly traded company.

II. Shortcomings of the current compromise: legal uncertainty and risks of regulatory arbitrage

We take note of the Commission's objective of allowing an EU Inc. to seek admission to trading without requiring it first to convert into a national legal form fit for trading on a regulated market. We understand that mandatory conversion could create additional costs and delays, and weaken the attractiveness of the EU Inc. form, by reducing the value of the regime for

scale-ups seeking access to market financing without discontinuity. We understand that this concern is shared by a certain number of Member States and Members of the European Parliament.

However, we cannot be fully satisfied by the proposed solution. What was deemed absolutely unacceptable for the unlisted EU Inc.—namely, 27 different versions of the 28th regime—is precisely what is being proposed for the listed EU Inc., even though the task is far more complex.

The current drafting of the relevant provisions in recital (42) and Article 60 merely refers to applicable Union and national law. Union law lays down a substantial number of requirements applicable to listed companies, including rules on audit committees (Statutory Audit directive), corporate-governance statements (Accounting directive), directors' remuneration, shareholder identification and general meetings (Shareholder Rights directive), capital transactions (Company Law directive), takeover bids (Takeover Bids directive), periodic financial disclosure (Transparency directive), sustainability reporting (CSRD) and gender balance on boards (Women on Boards directive). However, these directives do not harmonise every matter exhaustively: they presuppose complementary national rules governing the corporate form itself.

This situation creates two difficulties:

- It does not determine which rules should apply for listed EU Inc., especially in a crossborder context.
- It could also create a risk of regulatory arbitrage between the 27 different versions, since listed EU Inc. companies could choose jurisdictions offering the least demanding framework. We believe that competition between listing venues should not be based on gaps in shareholder protection, but on market quality and financing opportunities. These divergent approaches could undermine the level playing field between the EU Inc. legal form and comparable national listed companies and, ultimately, undermine confidence in the EU Inc.

III. A need for clarification on applicable law for cross border listings

Article 60(2) currently provides that "*An EU Inc. company may seek admission to trading of its shares on a regulated market where Member States provide for that possibility in their national legislation*".

However, it is unclear whether this requirement applies to the Member State of incorporation, the Member State of the regulated market, or both. If the regulation is to be understood to require Member States to determine whether EU Inc., irrespective of their country of incorporation, may seek admission to trading on a regulated market located in their jurisdiction, it could be interpreted, for instance, as requiring a regulated market to

accommodate an EU Inc. incorporated in another Member State, even if that Member State in question had not itself provided for EU Inc. companies to access regulated markets.

This, in turn, raises the question of the applicable rules for such a cross-border listed EU Inc. Several Union laws attach their requirements to the Member State of the company's registered office (Article 4 of the Women on Boards directive for instance). Others rely instead, at least partly, on the location of the regulated market and may contain complex allocation rules (Article 4 of the Takeover Bids Directive for instance).

This issue can be illustrated by the example of an EU Inc. incorporated in the Netherlands and seeking admission to trading on a regulated market in France, where the Dutch law does not allow an EU Inc. to be listed. Under Article 4(2)(b) of the Takeover Bids directive, French rules would govern the bid procedure and the consideration offered (incl. offer price, announcement of the bid, offer document and disclosure requirements), while Dutch rules would govern the company law aspects (incl. the percentage of voting rights which confers control and any derogation from the obligation to launch a bid).

How will the French regulator handle the case if the Dutch law does not determine how these rules apply to a listed EU Inc. specifically? Should the Dutch mandatory bid threshold apply to a Dutch EU Inc., even though the Dutch law does not provide for the possibility for EU Inc to list? Will the French regulator have to deal with 27 different percentages of voting rights conferring control in the same regulated market?

Against this background, Article 60 should, at the very least, identify which Member State (incorporation and/or listing) has to provide for the possibility for an EU Inc. to list. For legal certainty, we believe that this option should be exercised both in the Member State of incorporation and, when different, the Member State of listing.

Even in the case when both Member States exercise this option, Article 60 should provide for a clear attribution rule, so as to avoid uncertainty in cross-border situations.

Finally, we believe that, given the new drafting of Article 4 in the second compromise text, it should be specified that the hierarchy of norms is without prejudice of the provisions of Article 60. Otherwise, there would be a clear conflict of norms since, in the case of a listed EU Inc., all relevant Union law should be applicable, as stated in Article 60 itself.

IV. A decentralised and proportionate solution to avoid regulatory arbitrage, building on safeguards defined at the national level

We acknowledge that creating a uniform rulebook for listed EU Inc. companies would be complex and time-consuming. It would both significantly burden the current text and disrupt the pace of negotiations. The best solution for achieving true European harmonisation would be a distinct regulation dedicated to listed EU Inc. companies and negotiated after the current text.

We propose a thoughtful debate on this solution.

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If a majority of Member States would prefer a quick fix in the current Regulation, we believe that a more proportionate solution should be retained.

As envisaged in the compromise text, Member States remain free under this assumption to decide whether EU Inc. companies may be admitted to trading on a regulated market in their jurisdiction and to define the relevant national framework. However, a Member State exercising that option should be required to adopt or designate the national rules necessary to ensure compliance with Union law and with national law implementing Union law, in a number of specified areas. Members States shall notify the Commission the provisions of its law which it implements in this respect.

This second best approach would preserve the simplicity of the EU Inc. and its European character: the Regulation would not need to define a fully harmonised set of listed company law, and a company seeking listing would not have to convert into another national legal form. At the same time, it would reduce the risks of regulatory arbitrage by requiring each willing Member State to connect the EU Inc. to a complete and identifiable set of national provisions.

Our proposed amendment to Article 60 identifies the main areas that the designated national framework should cover:

- free transferability and admission of shares;
- composition, functioning, duties and liability of company bodies;
- shareholder rights, and minority shareholder protection;
- capital formation, increase and reduction, distributions, and acquisition of own shares;
- related-party transactions and directors' conflicts of interest;
- general meetings, participation and voting;
- audit committees, internal control, risk management and statutory audit;
- appointment, remuneration and gender balance of directors;
- corporate governance statements, financial and sustainability reporting and disclosure;
- takeover bids and changes of control.

The amendment would also establish two essential guarantees while preserving national flexibility in defining such rules:

- Those national provisions should ensure that investors in a listed EU Inc. benefit from protection equivalent to that afforded under national law to investors in comparable national companies whose shares are admitted to trading.
- Members States shall notify the Commission the national provisions adopted for this purpose. This transparency would make the applicable framework accessible to companies and investors, while enabling the Commission to monitor implementation across the Union.

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Annexes

PROMISE TEXT PROPOSAL	DRAFTING SUGGESTIONS
Article 60 ***Access to public markets for shares***	***Article 60*** ***Access to public markets for shares***
1. Member States shall not prohibit an EU Inc. company from seeking admission to trading of its shares on a multilateral trading facility, provided that the company complies with the applicable requirements under Union and national laws. 2. An EU Inc. company may seek admission to trading of its shares on a regulated market where Member States provide for that possibility in their national legislation and subject to compliance with the applicable requirements under Union and national laws. 2a. Where the applicable requirements under Union and national laws referred to in paragraphs 1 and 2 conflict with a provision of this Regulation, those applicable requirements shall prevail. In particular, Articles 53-54, 56(1) and 58-59 shall not apply where those applicable requirements require use of a central securities depository or institutional intermediary. However, those applicable requirements may not require the EU Inc. to change into another legal form.	1. Member States shall not prohibit an EU Inc. company from seeking admission to trading of its shares on a multilateral trading facility, provided that the company complies with the applicable requirements under Union and national laws. 2. An EU Inc. company may seek admission to trading of its shares on a regulated market where **the** Member State~~s provide for that possibility in their national legislation and subject to compliance with the applicable requirements under Union and national laws~~ **of incorporation and, if different, the Member State of the regulated market provide for that possibility and have adopted the national rules necessary to ensure compliance with Union law, including national provisions implementing Union law**. **Such rules shall include, where appropriate, provisions relating to:** **(a) the free transferability of shares and their admission to trading;** **(b) the composition, organisation and functioning of the board of directors and other company bodies, and the duties and liability of directors and members of such bodies;** **(c) shareholder rights and the equal treatment of shareholders, including the protection of minority shareholders;** **(d) the formation, maintenance, increase and reduction of capital, distributions and the acquisition of own shares;** **(e) related party transactions and directors' conflicts of interest;**

	(f) the organization and conduct of general meetings, shareholder participation and voting procedures; **(g) audit committees, internal control, risk management and statutory audit;** **(h) the appointment, remuneration and gender balance of directors and members of other company bodies;** **(i) corporate governance statements, financial and sustainability reporting and disclosure;** **(j) takeover bids, changes of control and the powers and duties of the board of directors and other company bodies during such bids.** **This Regulation shall not prevent Member States from applying to such EU Inc. company national provisions necessary to comply with, or to implement, Union law specifically applicable to companies whose shares are admitted to trading on a regulated market. Those national provisions shall ensure that shareholders and investors in an EU Inc. company benefit from protection equivalent to that afforded under national law to shareholders and investors in comparable companies whose shares are admitted to trading. Members States shall notify the Commission the provisions of its law which it implements in this respect.** 2a. Where the applicable requirements under Union and national laws referred to in paragraphs 1 and 2 conflict with a provision of this Regulation, those applicable requirements shall prevail. In particular, Articles 53-54, 56(1) and 58-59 shall not apply where those applicable requirements require use of a central securities depository or institutional intermediary. However, those applicable requirements may not require the EU Inc. to change into another legal form. **2b. This Regulation shall be without prejudice to the rules determining the applicable law, the competent Member State or the competent authority laid down in applicable Union law, including directive 2006/43/EC [statutory audit directive], regulation (EU) No 537/2014 [statutory audit regulation], directive 2013/34/EU [accounting directive], directive 2007/36/EC [shareholder's rights directive],**

	directive (EU) 2017/1132 [company law directive], directive 2004/25/EC [takeover bids directive], directive 2004/109/EC [transparency directive], directive 2014/65/EU [markets in financial instruments directive], regulation (EU) No 596/2014 [market abuse regulation], regulation (EU) 2017/1129 [prospectus regulation] and directive (EU) 2022/2381 [women on boards directive].

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