

## **REMARKS BY THE NETHERLANDS FOLLOWING THE PUBLIC CONSULTATION ON THE 28<sup>TH</sup> REGIME – AN EU CORPORATE LEGAL FRAMEWORK**

European competitiveness is under pressure and productivity growth is lagging significantly. This is the core message of Enrico Letta and Mario Draghi in their reports on the European Single Market and competitiveness published last year.<sup>1</sup> The Netherlands is committed to enhancing European productivity and competitiveness.<sup>2</sup> Further integration of national capital markets and uniform legislation is of fundamental importance to achieve this. Therefore, we are looking with great interest to the Commission's consultation on the creation of a new legal status for companies as part of a future 28th regime to remove barriers for innovative companies in the European Union (EU) and to facilitate their growth. The consultation contains questions on the design and framework of such a new legal status, with a specific view on how such a status could benefit small and medium-sized enterprises (SMEs), and in particular start-ups and scale-ups, and their founders wanting to operate and expand across the Single Market, without being limited to them.

The consultation consists of five parts: (I) Barriers related to corporate law issues, (II) Structure and the core elements of the 28<sup>th</sup> regime companies, (III) Simple, flexible and fast procedures and rules for the 28<sup>th</sup> regime companies, (IV) Attracting investment to the 28<sup>th</sup> regime companies, and (V) Other Issues. Before addressing these five parts, the Netherlands makes several general remarks.

### **General**

The Netherlands is in favour of the development of a 28<sup>th</sup> regime that can adequately meet the needs of all businesses and stakeholders in the EU. Facts and needs from practice should guide our actions. To establish these facts and needs, the Netherlands, firstly, believes that a **substantive problem analysis** is necessary. It should be clear what the problem is, which obstacles must be tackled, and it should be substantiated how a new legal form could effectively tackle the problem and the obstacles. A well-substantiated Impact Assessment should enable assessment whether a new legal form meets the needs of businesses in the EU helping them to attract investment and scale up their cross-border activities. Furthermore, this Impact Assessment should also consider the broader societal impact of a 28<sup>th</sup> regime.

Secondly, the Netherlands thinks it is important to **learn from previous experiences** with optional European legal frameworks and legal forms, especially regarding their effectiveness and chosen legal basis. The EU has previously made use of this legislative technique when adopting the Societas Europaea (SE), the European Cooperative Society (SCE) and the European Economic Interest Grouping (EEIG). Furthermore, the Commission proposed the Societas Privata Europaea (SPE) in 2008, the Common European Sales Law (CESL) in 2011, the statute for a European Foundation (FE) in 2012, and the Societas Unius Personae (SUP) in 2014 as possible '28th regimes'; however these legislative processes were never concluded. Currently negotiations about a proposal of the Commission for a new legal form regarding a European cross-border association (ECBA) are ongoing.

Thirdly, any future proposal in this area should be **proportional**. According to the consultation, the goal of a new European corporate legal framework is to benefit start-ups and scale-ups and their founders wanting to operate, expand and attract investments across the internal market. The Impact Assessment should explore how this goal can be reached most effectively for example by looking into significantly amending already existing company law measures. More specifically, in our opinion, the Impact Assessment needs to unequivocally demonstrate that creating a new European legal form better meets the stated goal than amending already existing company law

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<sup>1</sup> Mario Draghi, The future of European competitiveness, September 2024. Enrico Letta, Much more than a market, April 2024.

<sup>2</sup> The letter of the Minister of Finance to the Dutch Parliament of 17 March 2025 and the attached Appendix – Explanation of Actions. Available on: <https://www.government.nl/documents/parliamentary-documents/2025/03/17/the-netherlands-commitment-to-the-capital-markets-union>.

measures like (i) substantially improving existing European corporate legal forms (i.e. the SE and SCE) to be suitable for a wider range of companies, in particular start-ups and scale-ups or (ii) improving the cross-border mobility of national legal forms.

The Netherlands gives the following points into consideration:

- I. The creation of additional legal, administrative and financial burdens associated with the SE currently contributes, amongst others, to limiting the uptake of the SE by start-ups and scale-ups. The SE Regulation<sup>3</sup> could be made more flexible to increase its uptake amongst smaller companies. The Netherlands, therefore, favours an **evaluation of the SE Regulation** to examine in what way the SE could be simplified. For example, by allowing that the seat and registered office may be in different Member States. Currently, the 'real seat' theory greatly limits the mobility of SE's. Furthermore, the EU minimum capital requirement for SE-companies of EUR 120.000 forms a high threshold compared to similar legal forms in Member States. The high minimum amount of capital needed for an SE could be seen as an impediment for start-ups and scale-ups in particular.
- II. The **Mobility Directive**<sup>4</sup> provides a European legal framework on cross-border mergers, divisions and conversions of companies. Currently, the scope of this Directive (a) does not include **divisions where the recipient company is an already existing company** and (b) is **limited to reorganisations within the EU**. In this regard, the Netherlands would like to point out that in 2024 the Dutch Expert Group on modernisation of Public Limited Company Law<sup>5</sup> submitted recommendations on cross-border mergers, divisions and conversions. The Expert Group advises, amongst others, to broaden the geographical scope of the rules on cross-border mergers, divisions and conversions, to enable reorganisations to or from countries outside the EU. The recommendations of the Expert Group are attached to these remarks (only available in Dutch).<sup>6</sup> A more flexible framework where companies can move more easily across borders could also attract start-ups and scale-ups from outside the EU wanting to convert their company to a corporate legal form of one of the EU Member States.

Simplifying existing company law measures is also in line with the aim to **simplify existing EU laws and reduce regulatory burdens** as prioritised in the Commission work programme for 2025.<sup>7</sup>

Fourthly, a point of attention is the **prevention of abuse of legal entities**. A new European legal form should not facilitate circumvention of national rules regarding the misuse of legal entities, for example by circumventing checks that have been incorporated into Member State regimes for the purpose of fraud prevention. Regrettably, the Netherlands notices the topic of abuse is absent in this public consultation, and the Netherlands is of the opinion that this should be included in the Impact Assessment.

Fifthly, the Netherlands pleads for a legal framework that provides a clear status for companies, with a **sound legal basis and respect for the division of competencies** between the Member States and the EU.

Lastly, according to the Netherlands, any initiative for a 28th regime should also be **accompanied by harmonisation at EU level in other relevant fields of law** for which the Netherlands provides several suggestions in Part V. In any case, a fragmented landscape, with 27 different

<sup>3</sup> Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE).

<sup>4</sup> Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019 amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions.

<sup>5</sup> The Expert Group consists of Dutch academics, practising lawyers and representatives from different stakeholders.

<sup>6</sup> Expertgroep Moderniseren NV-recht, Advies Grensoverschrijdende Herstructureren, 2 September 2024, p. 8, available at: <https://open.overheid.nl/documenten/fb1f6b1c-fc3d-4a81-8def-fb1ca57b33b5/file>.

<sup>7</sup> Commission work programme 2025, Moving forward together: A Bolder, Simpler, Faster Union available at: [https://commission.europa.eu/document/download/f80922dd-932d-4c4a-a18c-d800837fbb23\\_en?filename=COM\\_2025\\_45\\_1\\_EN.pdf](https://commission.europa.eu/document/download/f80922dd-932d-4c4a-a18c-d800837fbb23_en?filename=COM_2025_45_1_EN.pdf).

implementations and different forms of an EU company, should be prevented. For the success of the 28<sup>th</sup> regime it is vital that the regime provides for certain standard rules on the structure and the core elements of the 28<sup>th</sup> regime companies (e.g. the decision-making processes within the company, shareholder rights) from which MS cannot deviate in their implementation in order to improve legal certainty and reduce administrative costs.

## **I. Barriers relating to corporate law**

The Netherlands signals that companies wishing to establish, operate, scale-up or attract investments face fragmentation of relevant regulations (*Question 2*). Corporate law and related law areas still vary strongly between Member States. Even in harmonised areas, differences in the transposition or application of the rules persist. The fragmentation leads to barriers for all companies with cross-border ambitions. It especially hampers the growth potential of smaller and innovative companies, such as start- and scale-ups. Besides being time-consuming, start-ups and scale-ups with cross-border ambitions often lack the resources to navigate through the different legal regimes in the EU. The 2024 Investment Survey of the European Investment Bank (EIB)<sup>8</sup> indicates that the regulatory burden is particularly high for SMEs.

Investors are less familiar with companies from other countries, and differences in applicable rules make it difficult to estimate a company's potential. Attracting cross-border financing is fundamental for business in the start- or scale-up phase. On this issue, the EU lags behind compared to other major economies causing European innovative businesses to operate outside the EU. Language and cultural differences also play a role in making cross-border investment difficult. This often leads to a preference for the local market, known as home bias. In general it is our opinion that for an effective 28th regime it is necessary also other related fields of law are harmonized. The Netherlands has advanced its views on the need for further harmonisation on key aspects of the Capital Markets Union in Part V.<sup>9</sup>

## **II. Structure and core elements of the 28<sup>th</sup> regime**

As outlined in its general remarks above, the Netherlands does not have enough information yet to judge whether a proposal for a new European corporate legal framework would be proportionate in reaching its envisaged goal of facilitating SMEs, and in particular start-ups and scale-ups, and their founders to attract investment and scale up their cross-border activities (*Question 4*). Without prejudice to its previous general remarks, the Netherlands is of the opinion that any new European corporate legal framework should be trustworthy, reliable, flexible and practically workable for businesses, in particular start-ups and scale-ups. Investors must be aware of their rights and obligations. Creditors must be able to assume that the company offers adequate recourse. And employees must be able to rely on preservation of their rights. This is important to minimize the risk of legal proceedings and additional burden on the judiciary, and to prevent abuse. The Netherlands, therefore, considers the following elements to be essential for any new European corporate legal framework introduced:

- The possibility to opt for a European company should not be limited to a particular category of 'innovative companies' or to other limiting factors, but should be available for private limited liability companies in general. Making access to the legal framework conditional on the parties providing the necessary evidence to qualify as eligible – for example to showcase their 'innovative' character – would significantly increase the administrative burden and add unnecessary red tape (*Question 5*).
- The Netherlands considers it important that a company should not be required to have its registered office in the same country that it has the seat of its central administration (head office). Such a requirement would be an impediment to the mobility of such a company (*Question 9*).

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<sup>8</sup> EIB, EIB Investment Survey 2024 – EU overview (2024), available at: <https://www.eib.org/en/publications/20240238-econ-eibis-2024-eu>.

<sup>9</sup> The letter of the Minister of Finance to the Dutch Parliament of 17 March 2025 and the attached Appendix – Explanation of Actions. Also available on: <https://www.government.nl/documents/parliamentary-documents/2025/03/17/the-netherlands-commitment-to-the-capital-markets-union>.

- For adequate protection of creditors, the Netherlands is of the opinion that a minimum capital requirement for private limited liability companies does not provide adequate protection for creditors and could be an unnecessary obstacle for start-ups. Instead of a minimum capital requirement, the Netherlands considers it critical the company should conduct a balance sheet test and distribution test. The balance sheet test assesses the possible distribution, taking into account reserves that a company is obliged to keep in accordance with the articles of association or the law. The distribution test examines whether a dividend distribution does not result in the company no longer being able to pay creditors. This test is performed by the board of the company (*Questions 10-12*).
- A company using the legal framework should be obliged to have a minimum of one shareholder (*Question 7*).
- The Netherlands is of the opinion that any new European corporate legal framework should be in accordance with existing Union and national laws in the area of employee codetermination (*Question 13*).

### **III. Simple, flexible and fast procedures and rules for 28<sup>th</sup> regime**

The Netherlands supports the call for simple, quick and digitally available procedures throughout the company life cycle. The Netherlands believes companies could greatly benefit from straightforward and fast procedures. At the same time, companies should have the flexibility to choose between a fully-digital process or an in-person process. An in-person process can increase the trust of companies in the processes.

Furthermore, it is important to build further on existing processes and tools such as the two Directives on digitalization (2019/1151 and 2025/25) which contain a lot of improvements and changes in the procedures concerning the establishment and operation of a company. For example, in the Netherlands, the use of electronic identification is significantly improved. It is now possible to establish and register a private limited liability company (BV) quickly and fully online. Also more and more changes in the lifecycle of a company are registered online, depending on the availability of and adoption by companies of electronic means of identification with a sufficient level of trustworthiness. In order to facilitate online filings from other member states additional national legislation is expected to be ready soon (*Questions 18 and 19*). Further, in our opinion companies – including 28<sup>th</sup> regime companies – could benefit from the future European Business Wallet (*Question 20*).

A balance should be struck between realizing swiftness and simplicity on the one hand and reliability of the procedures on the other hand. In the Netherlands, the establishment of a BV can be done within two business days. This seems to be a reasonable time and allows for a diligent process. A faster establishment and registration does not accelerate other necessary steps necessary for a company to start its activities. Obstacles for companies rise beyond the establishment and registration procedure itself (*Question 16*). Companies wishing to operate cross-border often face obstacles after they are set up, due to different rules in the Member States, e.g. for opening a bank account, applying for subsidies or permits or filing taxes.

Any new European legal framework introduced should provide flexibility for companies. In order to allow for simple and fast procedures, EU-wide optional templates of an Instrument of Constitution or Articles of Association could be helpful, becoming available for those companies wishing to use them (*Question 21*).

Furthermore, to improve participation in general meetings of shareholders and to reduce administrative burden and costs, it should be possible for a legal form to decide to have its general meetings in hybrid mode or fully online. This decision should be laid down in the Articles of Association<sup>10</sup> (*Questions 24-26*).

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<sup>10</sup> In this regard inspiration could be derived from the Dutch draft bill on digital general meetings of private legal persons which is currently debated in the Dutch Parliament (*Wetsvoorstel digitale algemene vergadering privaatrechtelijke rechtspersonen*), available at: <https://www.tweedekamer.nl/kamerstukken/wetsvoorstellen/detail?cfg=wetsvoorsteldetails&qry=wetsvoorstel%3A36489>.

At the same time, as expressed above, the perspective of legal certainty, prevention of misuse and fraud and the protection of third parties should be taken into account. To that end, the Netherlands finds it important that national safeguards in the procedures for setting up a company or changing the Instrument of Constitution or Articles of Association should remain in place. Furthermore, verification and identification procedures should be trustworthy and safe.

#### **IV. Attracting investments to 28<sup>th</sup> regime**

As mentioned above, innovative companies in Europe, such as start-ups, struggle to obtain suitable financing. In the EU and also in the Netherlands, companies are too dependent on bank financing. Bank loans are available due to the large and strong banking sector, but are mainly suitable when there is little risk and the financing horizon is shorter.

This type of financing is therefore often unsuitable for financing innovation or for new, strategic technologies that are necessary for productivity growth and resilience. At the same time, the European capital market is not attractive or accessible enough for companies. The (venture) capital market and the stock market landscape are fragmented, and liquidity – the supply of capital and trading in shares, bonds, and other financial instruments – is low. For this reason, Dutch companies often look to foreign investors, mostly in the US.<sup>11</sup>

Banks focus on lending and have scaled back their capital market divisions. There are also few large private investors and investment funds that can participate in later financing rounds of scale-ups. This makes it harder for companies to attract equity capital, as concluded in a recent government study regarding corporate financing.<sup>12</sup> As a result, SMEs and young, innovative companies find it difficult to grow from start-ups into successful, large (listed) companies.

In general, the Netherlands would look positively to a proposal for a 28th regime if this will help innovative companies to finance growth or could lead to a growth in available capital.

#### **V. Other issues**

An initiative for a new EU legal form should not be seen in isolation. As expressed in its remarks, the Netherlands believes companies will only be able to fully enjoy the Single Market if also certain regulations in other fields of law are harmonised and applied in the same way throughout the Member States. To this end, the Netherlands has proposed further EU action and harmonisation in certain areas, such as the need for an instrument to harmonise aspects of formal insolvency law, in particular to speed up proceedings, increase creditors' information and participation, increase legal protection of creditors and speed up payouts. Furthermore, the Netherlands encourages the Commission to investigate how the national insolvency rules differ in each Member State regarding the ranking of claims. Also the Netherlands sees advantages in, for example, the development of an optional EU financial reporting standard for SMEs. For an elaboration on amongst others these proposals we refer to the Netherlands' Commitment to the Capital Markets Union attached to these remarks (*Question 39 and 50*).<sup>13</sup> At the moment, the Netherlands sees limited potential in a 28th regime in relation to labour law due to the mostly national character of labour markets. Hence, the Netherlands will look carefully at any proposal related to labour law (*Questions 42 and 43*).

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<sup>11</sup> KPMG rapport ([Shaping the future of the Dutch capital market - KPMG Netherlands](#))

<sup>12</sup> Interdepartementaal Beleidsonderzoek Bedrijfsfinanciering ([Kies voor baten - IBO Bedrijfsfinanciering | Rapport | Rijksoverheid.nl](#))

<sup>13</sup> The letter of the Minister of Finance to the Dutch Parliament of 17 March 2025 and the attached Appendix – Explanation of Actions. Also available on: <https://www.government.nl/documents/parliamentary-documents/2025/03/17/the-netherlands-commitment-to-the-capital-markets-union>.