28th Regime, draft response to the EC consultation

I/ Introduction

We are delighted that the European Commission has initiated a process of reflection on the harmonisation of business law within the European Union.

Taken up by the Letta and Draghi Reports, the subject was brought up in 2016 by a group of lawyers from the Henri Capitant Association, with the support of the Foundation for Continental Law, among others.

The expected benefits of such defragmentation of business laws and corresponding markets are:

- strengthening European sovereignty and competitiveness;
- reduction of costs for companies;
- achieving economies of scale and facilitating cross-border growth;
- improving access to capital markets;
- and more generally, the establishment of a truly integrated market (one market/one law).

However, we are disappointed that the use of the term "28th regime" in this consultation is currently **inaccurate**.

Apart from the fact that this name will immediately become **obsolete** if the number of Member States changes, it suggests that a regime would be created "alongside" that of the 27, without Member States, citizens or territory: this may result in a "**disembodied**" nature.

The 28th regime should therefore be understood to mean the adoption of a **set of optional, unified and directly applicable European rules** capable of establishing a common regime for the Member States, or **an "*optional European regime*"** allowing any company, regardless of its size or sector, to choose to operate under a harmonised European legal framework, as an alternative to the national law of each Member State.

II/ Characteristics of the "28th regime"

Therefore, this "28th regime" should have several characteristics:

- **openness to all companies**: the 28th regime must be **open to all companies** registered in the European Union, without any restrictions on size, sector, type of activity or nationality of the founders; in particular, limiting its scope to so-called "innovative" companies would be a major mistake and would create legal uncertainties that could ruin the attractiveness of the new system: this would introduce *threshold* effects and send a message of *exclusion* to companies that are not be considered "innovative"; in particular, this regime must concern not only start-ups, VSEs and SMEs, but also mid-sized companies or large groups;

- **optionality for companies and not for States**: this must be an **optional regime for companies but mandatory for Member States**; in matters not falling within the exclusive competence of the Union (such as competition law), each company must remain fully free to choose between national law or the unified European regime, according to its needs and development strategy; on the contrary, Member States must not avoid incorporating this unified European regime into their law, with **regulation** being preferred to directives wherever possible;

- consolidation of the general principles of European Union law applicable to companies: the 28th regime must not call into question the community knowledge, which must, on the contrary, be consolidated and extended by the introduction of a new corporate form

- **prefiguration of a more general European Business Code**: the call for consultation currently focuses on company law; however, the fragmentation of markets does not boil down to a fragmentation of the company laws of the 27 Member States; it is therefore important for the European Commission to have a **longer-term ambition and vision**; this 28th regime must ultimately be able to cover all aspects of business law necessary for the life and growth of European companies by including in particular and without being exhaustive questions of financing, securities, financial markets, insolvency procedures or even taxation of innovation, etc. In this respect, the European Commission should integrate the **advantages of a codification of business law on a "regional" scale**, on the model of precedents carried out in countries with a continental tradition (**OHADA** zone) or not (in the United States: **UCC and US Code**). Codification has the advantage of legal certainty offered by a written text accessible to all and of

economic efficiency through a unifying codification that facilitates the integration of markets.

III/ Draft European Business Code

These strengths led the Henri Capitant Association to mobilise nearly a hundred lawyers from the European Union, independently, to propose a preliminary draft European Business Code comprising 13 Books:

Book 1 – General Commercial Law
Book 2 – Market Law
Book 3 – E-Commerce Law
Book 4 – Company Law
Book 5 – Law of Security Interest
Book 6 – Enforcement Law
Book 7 – Insolvency Law
Book 8 – Banking Law
Book 9 – Financial Markets Law
Book 10 – Intellectual Property Law
Book 11 – Labour Law
Book 12 – Insurance Contract Law
Book 13 – Tax Law (including taxation of innovative European companies)

These preliminary draft texts are **sources of inspiration** to facilitate prompt work by the European Commission.

IV/ Initial response for company law

The simplified European company or *Societas Europaea Simplificata* (SES) must be the cornerstone of the 28th regime. Indeed, the cumbersome nature of the current European company (SE) regime, the impossibility of setting it up *ab initio* and its access cost of 120,000 euros have made it inaccessible to the majority of people. It is practically reserved for large companies. However, European entrepreneurs have long expressed the desire to be able to form a very flexible company, like the French SAS.

How, moreover, can one feel fully European and trade in a single market when the establishment of a company - the cornerstone of any business - is to operate under a purely national corporate structure (SAS, BV, GmbH, etc.)? However, an activity that is born "national" and not European will too often remain so.

Where does the draft Simplified European Company or SES come from? It is the subject of very comprehensive provisions in the preliminary draft of Book 4 relating to company law and each of the elements of the acronym has a particular meaning:

- ***A company***... first of all: the SES would complement the very insufficient range of European corporate types (SE, EEIG, SCE) with a *new form of company suited to small and medium-sized enterprises*. The SES is a limited liability company, whether multi-person or single-person, that would be ten times more accessible than the SE, since only 12,000 euros of share capital would be required for its formation (with a quarter being payable immediately and the remainder within 5 years);

- ... *then* ***European***, the SES would be European from a triple point of view. Legally, it would be subject to a chapter of European provisions specific to it and, only *subsidiarily*, to the national law of the State of registration (form of the articles of association and the transfer of shares, in particular). Economically, it would greatly contribute to the integration of the common market, promote cross-border trade and could be chosen in all Member States, while facilitating the management of European groups of companies. Politically, it would invite the founders of SES to see the European Union as an area of freedom of enterprise, by initiating their economic activity under the influence of a tool offered by the EU;

- ***Simplified*** finally: the attractiveness and simplicity of the SES is due to the great **statutory freedom** that it would have; the proposed provisions limit the mandatory rules (mandatory mention of the articles of association, unanimity to undermine the free transfer of shares, protection of minority interests) and simply establish a general management with a wide legal power of representation, while inviting the articles of association to adopt rules on certain important issues and, above all, to freely agree on the organisation and operation of the SES as close as possible to the expectations of its founders; however, a fundamental reservation of the national mandatory rules (labour, tax, criminal, insolvency) tended from the outset to **prevent any social or tax dumping**; in particular, it was suggested in the preliminary draft relating to the SES that issues of **co-management and employee participation** be governed by the law applicable to the actual registered office of the company.

V/ Other key optional instruments

The financing of the SES must be facilitated by other instruments that are already among the drafting proposals of the draft European Business Code:

- **A European loan:** a contract for the provision of funds or a promise to provide funds by one company for the benefit of another, likely to free up cross-border and inter-company financing (bank financing mainly, but not exclusively for European companies);

- **European collateral** likely to guarantee such a European loan or any other credit: Euro-guarantee, Autonomous Euro-guarantee, Euro-pledge, etc.;

- **The possible issue of European bonds:** an issue of European bonds (which are not "eurobonds") would be an element of strengthening the union of savings and investments by allowing the emergence of a genuine European bond market to support the non-bank financing of European companies.

- **European Assignment of Receivables:** a synthetic body of uniform rules to avoid conflicts of laws in matters of assignments of receivables and to facilitate the mobilisation of receivables as securities or collateral throughout the European Union.

- **The possibility of obtaining a tax deduction for research and development expenses**: To support innovation, a new **European tax regime should be created.** A harmonised super-deduction in the EU equal to double the eligible research and development expenses (in addition, for example, to the French research tax credit) could support the creation of future European unicorns.