THE POTENTIAL OF A "28TH REGIME" APPLICABLE TO B2B TRANSACTIONS

Towards a European Business Code

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Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs

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Executive Summary

Core Diagnosis: A Fragmented Business Law Environment

Europe's Single Market operates without a unified business law framework, unlike other major economies. Companies - especially SMEs, startups and scale ups - must navigate 27 different national regimes for B2B contracts, securities, guarantees, assignment of claims, distribution networks, and dispute resolution.

This fragmentation increases legal costs, restricts access to cross-border financing, and limits the scale effects expected from a 449 million citizens and a €14.5 trillion market.

The Optional European Regime

The study stresses the importance of creating an **optional, unified, directly applicable European regime for B2B transactions**. This Optional European Regime (rather than "28th Regime") would:

- simplify contract formation and enforcement for cross-border operations;
- reduce compliance costs and transaction uncertainty;
- improve access to venture capital, private debt and other financing sources;
- facilitate scale-up dynamics and strengthen EU competitiveness.

Such a regime should be **open to all companies**, optional for businesses but mandatory for Member States to implement. It constitutes the **first operational layer** of a long-term codification strategy.

The First Corporate Law Step: Societas Europaea Simplificata (SES)

As President von der Leyen highlighted in 2026, the EU will propose a **new company structure - an EU-wide company with a unified capital and registration regime**. The ***Societas Europaea Simplificata***, drafted in Book IV of the EBC Project, should be positioned as the **first corporate law element** of the "28th regime".

Priority Tools for the Optional European Regime

The study identifies **seven priority instruments**, forming a coherent architecture for an integrated European B2B environment:

1. **European B2B Contract Law** (possibly limited to cross-border transactions)
2. **European Integrated Partnership Contract**
3. **European B2B Loan** (bank & non-bank, intercompany lending)
4. **European Guarantees** (eurosurety, euromortgage, possibly **eurofiducia**, etc.)
5. **European Assignment of Claims and Factoring**
6. **European Transfer of Securities**
7. **European Commercial Dispute Resolution** (specialised CJEU court; European ADR system).

These instruments would work **synergistically and bring growth**: contracts → financing → guarantees → liquidity → securities → dispute settlement.

Strategic Objective: Building a European Business Code (EBC)

This Optional European regime (*Societas Europaea Simplificata* + priority tools) should be conceived as a **first brick** towards a future **European Business Code**, a continental codification enabling:

- a coherent corpus of business rules across the EU;
- predictable, accessible, and intelligible legislation;
- reduced fragmentation in areas such as insolvency, guarantees, securities, B2B contracts, loans, distribution networks, and factoring;
- enhanced attractiveness and sovereignty of the EU model internationally.

This codification perfectly aligns with the visions expressed in the **Letta Report (2024)**, the **Draghi Report (2024)**, and **President von der Leyen's announcement (2026)** of a new legal company form.

Introduction

1. The business law fragmentation diagnosis. Fragmentation of European business law was first highlighted almost 10 years ago in a landmark study by Association Henri Capitant dated 2016, "*The integration of European business law: Acquis and outlook"* (Lextenso, pct. 2016, 400 p.). Valéry Giscard d'Estaing's foreword remains fully pertinent: ***"Company law is a powerful vector for economic, fiscal and social convergence****. This convergence is essential to the consolidation of the Euro, which is today the backbone of European construction. (...) This law, which governs the daily life of companies, has not been sufficiently taken into account by European leaders. Yet it is these hundreds of thousands of small, medium-sized and larger companies that are the lifeblood of Europe's economies and their necessary convergence. These industrial and commercial economic players are the primary source of wealth creation, growth and employment. They must evolve in a convergent legal, fiscal and social environment, as they operate within a unified monetary area, with free circulation of goods, services, capital and labor.* ***That's why it's time to back up the single currency, the Euro, with a foundation of unified business law".***

On April 18, 2024, former Italian Prime Minister Enrico Letta warned in his "Much more than a Market" Report of the Union's economic and competitive "stall", writing that "*a European Business Law Code would be a transformative step towards a more unified Single Market, offering companies a 28th regime for operating within the Single Market****. It would directly address and overcome the current patchwork of national regulations, acting as a key tool to unlock the full potential of free movement within the Union*****".**

The Draghi report, entitled "The future of European competitiveness" (September 2024), later shared the same diagnosis and instead proposed the creation of an innovative company and harmonized labor/tax law: "*Finally, the EU should support rapid growth within the European market by giving innovative start-ups the opportunity to adopt a new EU-wide legal statute (the "Innovative European Company"). This status would provide companies with a single digital identity valid throughout the EU and recognized by all Member States. These companies would have access to harmonized legislation concerning corporate law and insolvency, as well as a few key aspects of labor law and taxation, to be made progressively more ambitious, and they would be entitled to establish subsidiaries across the EU without incorporating separately in each Member State*" (p. 29). He also focused on the importance of codification of EU legislation in general, and not only with regard to business law: "*A second phase should focus on pursuing the codification and consolidation of EU legislation by policy area. This should include simplifying and removing overlap and inconsistencies across the whole 'legislative chain', with priority given to those economic sectors where Europe is particularly exposed to international competition (for instance, clean technologies)*." (p. 323).

Towards an optional European regime in the short term

2. Characteristics of a fair and efficient "28th regime". The European Commission's initiative to explore an optional "28th regime" for business-to-business (B2B) transactions must be warmly welcomed in this respect as it tends to address persistent legal business law fragmentation that continues to impede the full realization of the Single Market.

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

- strengthening European sovereignty and competitiveness;
- the drastic reduction in costs associated with complexity for businesses;
- 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, the use of the term "28th regime" may be seen as **inaccurate**. Apart from the fact that this name will 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.
According to Association Henri Capitant and Civil Law Foundation's joint response to the Commission's consultation on the 28th regime (Réponse à la consultation européenne sur le 28ème régime - Henri Capitant), the latter should therefore be understood to mean the adoption of a **set of unified, optional 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 harmonized European legal framework, as an alternative to the national law of each Member State (comp. "***Regime 0***" suggestion in the *Bruegel Policy paper* by Fiona Scott Morton and Reinhilde Veugelers: PB 33 2025_1.pdf)

3. Openness to all companies; **optionality for companies but not for Member States**. The regime should be accessible to any EU-registered company, irrespective of size, sector, activity type, or founders' nationality. Narrow "innovation-only" filters would fuel threshold effects, legal uncertainty, and an exclusionary signal to firms that are not labeled 'innovative', thereby undermining the regime's attractiveness.

Firms should indeed remain free to select national law or the EU regime according to strategy, while Member States must incorporate the regime, preferably via regulations to ensure uniformity, direct effect, and predictability.

Towards a European Business Code in the long run

4. Prefiguration of the European Business Code (EBC). The 28th regime should be architected as a step towards a comprehensive EBC that offers accessible, intelligible, and stable rules, grounding the Single Market in a coherent continental codification culture.

Codification provides greater clarity, accessibility, and efficiency both to companies and citizens.

Indeed, a code functions as a user-friendly map of legislation: it makes the law easier to access by organizing a set of rules from a thematic approach. It should be underlined that codification and the civil-law tradition are already shared by 24 of 27 Member States comprising more than 440 million European citizens out of 449 million.

Therefore, the EU Commission should consider the use of codification of EU legislation as previously suggested by Mr Draghi in his already mentioned Report on "The future of European competitiveness". It would **significantly improve the embodiment of EU legislation and allow for a more sovereign and attractive EU Single Market.**

A continental code would strengthen Europe's geopolitical reach by providing a competitive legal model for commerce. It may reduce compliance costs for companies, drastically increase legal certainty for transactions, and offer a durable platform for future reforms.
The idea of the code certainly represents one of the distinctive and established features of the civil law tradition. It brings together and transmits not only a wide range of techniques and values, but also a way of thinking about and applying law. For this reason, too, a code would be better suited than any other legal instrument to address the issues which are common to European business actors, to boost the Single Market and emancipate its potential.

A continental codification could also strengthen the reach and geopolitical role of the civil law tradition and enable our professionals to enter more seriously the race for leadership in applicable law in the arena of transnational commerce.
In the context of such competition, continental professionals would be equipped with a reservoir of rules that would be easily understood and managed by a large number of actors, partners and counterparts in Europe, and all areas of the planet governed by civil law - that is, most of the world.

One market, one law, one currency, one business code should be the goal in the long run. Only an EBC will help entrepreneurs navigate easily in EU law.

The EBC Project has aggregated the work of around one hundred experts from several Member States and delivered 13 preliminary drafts across key fields of business law: general commercial law; market law; e-commerce; company law; securities; enforcement; insolvency; banking; insurance; capital markets; intellectual property; labor; and tax (Draft European Business Code - Henri Capitant).

The aim of the draft EBC Project is to raise the profile of the European Union by highlighting the codification shared by so many countries, while promoting economic growth in the area and the completion of the common market. Drafting guidelines have been strongly monitored that tend to limit cross-references and provision length (e.g., an article with ≤ 3 paragraphs; each paragraph ≤ 3 sentences), maximizing readability and practical uptake.

5. *Societas Europaea Simplificata*, a first brick. Company law will not be addressed in this study and it is our understanding that the European Union will move forward on this topic shortly.

*In her **Special Address at the World Economic Forum on 20 January 2026, President von der Leyen indeed stated**: "This is why we need a new approach. We will soon put forward our 28th regime. The ultimate aim is to create a **new truly European company structure**. We call it EU Inc., with a single and simple set of rules that will apply seamlessly all over our Union. So that business can operate across Member States much more easily. Our entrepreneurs, the*

innovative companies, will be able to register a company in any Member State within 48 hours – fully online. They will enjoy the same capital regime all across the EU. Ultimately, we need a system where companies can do business and raise financing seamlessly across Europe – just as easily as in uniform markets like the US or China. If we get this right – and if we move fast enough – this will not only help EU companies grow. But it will attract investment from across the world".

In this respect, the pioneering work drafted on "*Societas Europaea Simplificata*" (Société Européenne Simplifiée or SES) in Book 4 of the EBC Project (https://www.henricapitant.org/wp-content/uploads/2024/11/Book-IV_Company-Law.pdf) should be a source of inspiration for this 28th regime and a first brick of a B2B 28th regime.

6. Study content. It seems paramount to start with a quick overview of the EU's insufficient acquis on B2B transactions **(I)**
Then, it will be useful to highlight solutions adopted in prominent countries that have rather successfully faced the issue of fighting fragmentation of business law **(II).**

Finally, this study will focus on identifying the main obstacles that businesses, including startups and scaleups, encounter when engaging in transactions with another business partner in the single market; these obstacles may be fought by identifying priorities for legal harmonization **(III).**

1. EU's Insufficient B2B acquis

1.1 EU acquis, too much regulation or not enough?

7. Insufficient acquis; impact of subsidiarity and proportionality rules. Europe has failed so far to let its business actors get the full benefit of the scale of the EU's single market, and of its vast amount of savings. This is sometimes seen as a case of too much regulation. Indeed, the EU plus each country have their own different rules which sometimes create overlaps and increase complexity (see also Luis Garicano, Bengt Holmström & Nicolas Petit, The Constitution of Innovation: A New European Renaissance). EU law is also often considered too "bureaucratic" and rather invasive. And there is a major aspiration for more simplicity and attractiveness, which has been taken into account in the competitiveness compass since January 2025 (Competitiveness compass - Consilium).

However, there is not necessarily a contradiction between more regulation and simplification. The current failure to fuel the European market may be linked to the fact that the EU has **not regulated enough some major aspects of B2B law**.

As a matter of fact, one tends to forget that the history of the EU legal construction itself explains why it is only dealing rather lately with the integration of business law issues. Indeed, integration of EU laws is largely dependent on the distribution of jurisdictions that derive from the Treaty on the Functioning of the European Union (TFEU).

A major issue derives from the fact that business law, in the widest sense, is dealt with by competencies that are sometimes **exclusive**, often **shared** (see Association Henri Capitant dated 2016, "*The integration of European business law: Acquis and outlook"* (Lextenso, pct. 2016, 400 p.).

While the principles of **subsidiarity** and **proportionality** are guarantors of the legislative sovereignty of the Member States of the EU, they **act as brakes on the unification of business law**.

1.2 Patchy EU acquis on business law

8. EU acquis's incompleteness in the field of business law. The heterogeneity of the scope of EU integration is tangible: while some areas are largely integrated, others are much less so, making the 28th regime and the EBC Project paramount contributions to the EU's future.

As far as business law is concerned, the EU acquis has been much more developed in the field of competition law, which falls within the exclusive jurisdiction of the EU, than in other fields where jurisdiction is shared, and subject to the principles of subsidiarity and proportionality (such as the internal market). This is even more true of tax matters, which are still subject in principle to the unanimity rule (**see the aforementioned "*The integration of European business law: Acquis and outlook"* (Lextenso, pct. 2016, p. 272 and seq.).**

The EU acquis is, for instance, remarkable in the latter topics: prudential regulation and supervision of credit institutions, insurance companies and providers of investment services; corporate governance and transparency of financial markets; company restructuring;

harmonization of indirect taxes and payment services; investor and consumer protection, particularly protection for borrowers; the regulation of e-commerce; industrial property rights; the fight against tax fraud, money laundering and discrimination; free movement of companies and workers, etc.

However, European integration of business law for startups and scaleups has been **insufficient**. Apart from key areas (competition law, market law, e-commerce law and industrial property law), **much remains to be done** if European business law is to be more closely integrated in the long run since the EU acquis in business law is incomplete.
The inventory of EU acquis underlined that it is robust in certain fields - most notably competition law, where the EU holds exclusive competence - but remains **patchy** elsewhere.
In summary and as of today (for an exhaustive overview dated 2016 please refer to the inventory **"*The integration of European business law: Acquis and outlook*" (Lextenso, pct. 2016):**

- **Competition Law**: The EU has developed a comprehensive and effective framework, including antitrust, merger control, and state aid rules (Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market PE/46/2022/REV/1).

- **Company Law:** The EU has created instruments such as the European Company (SE) (Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European Company (SE), OJ L 294, 10.11.2001, p. 1; Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European Company with regard to employee involvement, OJ L 294, 10.11.2001, p. 22), the European Cooperative Society (SCE) (Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE), OJ L 207, 18.8.2003, p. 1; Council Directive 2003/72/EC, OJ L 207, 18.8.2003, p. 25), and the European Economic Interest Grouping (EEIG) (Council Regulation (EEC) No 2137/85 of 25 July 1985, OJ L 199, 31.7.1985, p. 1), and has harmonised important aspects of company formation, disclosure, and cross-border mergers (Directive (EU) 2017/1132 relating to certain aspects of company law (codification) OJ L 169, 30.6.2017, p. 46; Directive (EU) 2019/2121 on cross-border conversions, mergers and divisions, OJ L 321, 12.12.2019, p. 1). However, **core issues** such as the law of groups, daily governance, and especially the creation of a European private company **remain unresolved** (thus making the adoption of a *Societas Europaea Simplificata* urgent).

- **Secured Transactions and Enforcement**: The acquis is limited to financial collateral and certain enforcement procedures (*e*.g., the European Enforcement Order Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims (the "EEO Regulation"), OJ L 143, 30.4.2004, p. 15; and the European Account Preservation Order Regulation (EU) No 655/2014 of the European Parliament and of the Council of 15 May 2014 establishing a procedure for a European Account Preservation Order to facilitate cross-border debt recovery in civil and commercial matters, OJ L 189, 27.6.2014, p. 59). There is **no unified regime for security interests**.

- **Banking and Financial Services**: The acquis is very extensive in prudential regulation, market infrastructure, and consumer protection, but lacunar in business lending and all sorts of contractual and other private law matters.

- **Intellectual Property**: The EU has harmonised market access and certain aspects of intellectual property law (e.g., the EU trade mark (Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark,

OJ L 154, 16.6.2017, p. 1), and EU designs (Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs, as amended by Regulation (EU) 2024/2822 of the European Parliament and of the Council of 23 October 2024, OJ L 2024/2822, 18.11.2024), now referred to as “European Union designs”). These are designs filed with the European Intellectual Property Office (EUIPO) and which produce their effects in all EU countries. It comes into force gradually, **between 1 May 2025 and 1 July 2026**, but **contract law and substantive IP rights (notably copyright) remain national**.

- **Social and Tax Law**: Harmonization is limited to specific areas (e.g., anti-discrimination, coordination of social security, indirect taxation). **Direct taxation and core social rights remain primarily national**.

Moreover, and from a political standpoint, it showed that the EU's business law acquis has developed primarily around *financial* regulation (prudential supervision, corporate governance, and consumer/investor protection) rather than on business law itself. This **financial tropism**, while important, implies that **the daily realities of commercial actor**s and entrepreneurs - especially those who are neither bankers, insurers, nor consumers - **have often been neglected by EU law**.

Because of this incompleteness of the acquis in business law, there is therefore definitely a **need - not necessarily for more regulation - but for a better one.**

1.3 Mapping harmonization of B2B transactions

9. EU acquis's incompleteness in the field of B2B contracts; prior failures to harmonize. Such incompleteness of the acquis in business law is made more damaging even because of the lack of regulation regarding B2B contracts in general.

There is **no general European contract law for business-to-business relations; contract laws remain purely national as of today despite prior attempts.**

Efforts to harmonize European contract law, such as the Common Frame of Reference (see Droit européen des contrats : cadre commun de référence – Association Henri Capitant) and the Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law/COM/2011/0635 final (CESL), have indeed faced strong resistance from national legal traditions.

Political reluctance, fear of legal uncertainty, and opposition from Member States and stakeholders undermined these projects.
The CESL's optional nature was criticized for complicating the legal situation and being disadvantageous to consumers: many felt that creating a set of rules parallel to national law (optional instrument, resembling the current "28th regime" solution…) would not "harmonize" the national rules nor replace them. Ultimately, lack of consensus and institutional support led to the proposal being abandoned in 2015 (06 2015 | Legal Affairs - JURI | Common European Sales Law (CESL).

It should be noted, however, that since the CESL, the EU has made significant progress in the field of certain B2B contracts. In particular, the 2019 directive on unfair trading practices in the food chain has overcome the resistance of those Member States who did not want control over clauses in B2B contracts. The DMA has increased these controls. A breach has been created

in the resistance that opposed the CESL before Brexit, and it is reasonable to assume that the resistance would therefore be less strong today.
However, some EU provisions expressly govern B2B contracts (i) or specific clauses (ii).

1.3.1 EU provisions expressly governing B2B contracts

10. Commercial agents. Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents has long been adopted, and it addresses a B2B contract, among the most unbalanced.

Other distribution contracts have not yet been regulated by European Union law: neither the (other) intermediation contracts, nor the contracts concluded by distributors acting on their own behalf.

11. UTPs and DMA. However, **regulation has emerged in two specific B2B sectors** where one of the parties is very/too powerful (large-scale distribution, digital).

This is, on the one hand, **Directive No. 2019/633 of 17 April 2019 on unfair trading practices (UTPs) in business-to-business relationships in the agricultural and food supply chain**, which was adopted after 11 years of work, starting from the very beginning of the reflection.

The directive **prohibits certain unfair B2B commercial practices** (10 "black" and 6 "grey") and provides for the establishment in the Member States of an **authority** responsible for enforcing these prohibitions, as well as for sanctions (Unfair trading practices - agriculture and rural development).

Furthermore, in press release 929/25 of 12 November 2025, the Commission announced that "The Council and the European Parliament have reached a provisional agreement on a regulation concerning new rules aimed at combating **unfair cross-border commercial practices** within the agricultural and **food** supply chain (https://www.consilium.europa.eu/en/press/press-releases/2025/11/12/council-and-parliament-strike-a-deal-on-combating-cross-border-unfair-trading-practices-in-the-agrifood-sector/pdf/).

This regulation aims to improve cooperation between the EU authorities responsible for enforcing the rules relating to unfair commercial practices within the agricultural and food supply chain. It forms part of the EU's efforts to support the position of farmers in the supply chain."

Thus, the intention is to strengthen the effectiveness of combating unfair commercial practices in this field and to address the possible cross-border dimensions of such practices.

And on the other hand, **the Digital Markets Act (DMA), Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828, OJ L 265, 12.10.2022, p. 1; see also Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 promoting fairness and transparency for business users of online intermediation services, OJ L 186, 11.7.2019, p. 57).**

This is a text inspired by major antitrust cases involving digital companies, which, on the one hand, establishes **ex ante sectoral regulation of gatekeepers** and, on the other hand, allows for the **sanctioning of unfair B2B commercial practices** by these same companies.

Article 12 §5 b is particularly noteworthy in that it sanctions a disproportionate imbalance: "*5. A practice referred to in paragraphs 1, 3 and 4 shall be considered as limiting the contestability of core platform services or as unfair: (...)"*
b) Where there is an imbalance between the rights and obligations of the business users and the gatekeeper obtains an advantage from the business users that is disproportionate to the service provided by that gatekeeper to those business users."

1.3.2 Provisions concerning specific B2B clauses

12. (i) Clauses concerning access to and the use of data or liability and remedies for the breach or the termination of data-related obligations.

Article 13 of Regulation (EU) 2023/2854 of the European Parliament and of the Council of 13 December 2023 on harmonised rules on fair access to and use of data and amending Regulation (EU) 2017/2394 and Directive (EU) 2020/1828 (Data Act), OJ L 2023/2854, 22.12.2023 specifies which term clauses are unfair regarding data access. It begins stipulating: "*A contractual term concerning access to and the use of data or liability and remedies for the breach or the termination of data-related obligations, which has been unilaterally imposed by an enterprise on another enterprise, shall not be binding on the latter enterprise if it is unfair*…".

The Commission has published **non-binding Model Contractual Terms for data access and use and Standard Contractual Clauses for cloud computing contracts**. They have been developed to help parties, especially SMEs, implement the provisions of the Data Act. Their use is voluntary and open to users' possible amendments. Although they were mainly drafted for business-to-business contracts, they can also be used in relations between businesses and consumers, if relevant consumer protection rules are added. (**Communication to the Commission, Approval of the draft Commission Recommendation on non-binding model contractual terms on data access and use and non-binding standard contractual clauses for cloud computing contracts (with Annexes),** Brussels, 19.11.2025, C(2025) 7750 final).

The Commission is also working on **forthcoming model contract terms on automated contracting.**
The growing deployment of innovative technologies such as AI and data-driven business models in private transactions has raised questions around potential needs for adaptations of private law, notably contract law, to the needs of the digital economy. Work has been done in the following two areas with implications for contracts: automated contracting and data in contracts. They gave rise to the writing of a "**Discussion papers HLF on Justice for Growth, 16 October 2025**".

The fair distribution of value to data providers for granting access to data was recognised as an important topic by many, also in view of encouraging data provision.

13. (ii) **Payment term clauses**. Intercompany payment deadlines have been regulated by **Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on fighting late payment in commercial transactions.**

However, it should be noted that a **draft regulation on payment deadlines in B2B contracts is currently being prepared (but has not yet been adopted), which would replace the 2011 Directive.**

It provides for the imposition, for commercial transactions between companies and those between public authorities and companies, of a payment period not exceeding 30 days from the date of receipt of the invoice or an equivalent payment request by the debtor, with no derogation envisaged. In the event of late payment, the text also makes it mandatory for the debtor to pay interest (and not penalties) equal to the reference rate applied by the ECB plus 8%. Finally, it should be noted that the amount of the fixed compensation due for each late-paid commercial transaction would increase from €40 to €50. (**Comm. EU, proposal for a regulation of the European Parliament and of the Council on combating late payment in commercial transactions, 12 Sept. 2023, COM (2023) 533 final**).

14. (iii) Anticompetitive clauses. These provisions have a significant impact on the content of B2B contracts, as, to benefit from exemptions, companies will avoid including certain clauses that would cause them to lose this advantage.

Thus, B2B contracts, and in particular distribution agreements, were subject to the rules of European competition law, and therefore to **Articles 101 and 102 of the TFEU** which respectively prohibit **cartels** and **abuses of dominant position.**

In particular, the successive vertical exemption regulations have influenced the practice of these distribution agreements:

- In matters of **vertical agreements**, in general, reference may be made to **Exemption Regulation 2022/720** (COMMISSION REGULATION (EU) 2022/720 of 10 May 2022 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, and Commission Guidelines (**Commission Communication Guidelines on Vertical Restraints 2022/C 248/01,** C/2022/4238). These texts replace the former **Regulation (EU) No 330/2010 of the Commission of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices** whose provisions were specified by a Commission Communication entitled **Guidelines on Vertical Restraints (2010/C 130/01)**. Pursuant to Article 10 of Regulation 2022/720, the prohibition laid down in article 101 §1 TFEU shall not apply during the period from 1 June 2022 to 31 May 2023, in respect of agreements already in force on 31 May 2022 which do not satisfy the conditions for exemption provided for in Regulation (EU) n°2022/720, but which, on 31 May 2022, satisfied the conditions for exemption provided for in Regulation (EU) n°330/2010.

- At the same time, the special exemption for vertical agreements relating to the purchase and resale of motor vehicles, which derived from Regulation (EC) No 1400/2002 of the Commission of 31 July 2002 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector, …was abandoned as of 1 June 2013, as regards the distribution of new motor vehicles, which has since been governed by the general vertical block exemption regime, while Commission Regulation (EU) No 461/2010 continues to apply solely to the after-sales markets for motor vehicles.

- On even more specific issues, in the field of technology transfer, the applicable framework is now set out in Commission Regulation (EU) 2023/1066 of 1 June 2023 on

the application of Article 101(3) TFEU to categories of technology transfer agreements, as complemented by the Commission Guidelines on technology transfer agreements (2023/C 259/01), which may also be relevant to certain vertical competition restrictions.

- The implementation of EU competition law is governed by Council Regulation (EC) No 1/2003 of 16 December 2002, as further specified by Commission Regulation (EC) No 773/2004 and by the Commission Communication on cooperation between the Commission and national courts (2004/C 101/04). Although the Commission published its evaluation of Regulation No 1/2003 on 5 September 2024, it has not decided whether revision is necessary. There appears to be no intention of reconsidering Regulation No 1/2003's fundamental principles.

15. (iv) Clauses on applicable law or jurisdiction clauses

The clauses in B2B contracts regarding the choice of applicable law, or jurisdiction clauses, are subject to the European texts on private international law, if they fall within their scope of application:

- Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I bis), OJ L 351, 20.12.2012, p. 1;

- Rome I Regulation (Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations), OJ L 177, 4.7.2008, p. 6;

- and, where relevant, the Rome II Regulation (Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations), OJ L 199, 31.7.2007, p. 40, in particular where certain conduct of contracting parties may be characterized as tortious.

16. (v) Geo-blocking Regulation

There are rules intended to prohibit suppliers from discrimination based on the place of establishment of the purchaser. This is particularly the case for the rules set out in **Regulation (EU) No 2018/302**, known as **Geo-blocking**, which seeks to prevent unjustified geographical blocking and any other discrimination based on the nationality, place of residence, or place of establishment of customers within the internal market, by regulating access to online interfaces, the general conditions of access to goods and services, and the means of payment accepted by professionals.

However, this Regulation benefits only the end user, not the distributor. The substance of the provisions of the Regulation should probably (i) be extended to all purchasers and (ii) not limited to online purchases.

17. (vi) Labeling rules. Labelling rules may also be mentioned, which are contained in sector-specific framework regulations (mainly, Regulation (EU) No 1169/2011 of the European Parliament and of the Council of 25 October 2011 on the provision of food information to consumers, OJ L 304, 22.11.2011, p. 18; Regulation (EC) No 1272/2008 of the European Parliament and of the Council of 16 December 2008 on the classification, labelling and

packaging of substances and mixtures, OJ L 353, 31.12.2008, p. 1; and Regulation (EU) 2017/1369 of the European Parliament and of the Council of 4 July 2017 setting a framework for energy labelling, OJ L 198, 28.7.2017, p. 1**)**. Apart from the fact that these are again sectoral rules, the question of the language(s) that must or may appear on the labelling, which is partly left to the discretion of the Member States, poses problems for the free movement of goods. It is not a specific text for B2B transactions, but it indirectly impacts the latter.

18. Mapping the acquis: summary. EU business law remains fragmented and incomplete, preventing a fully integrated and predictable European market. Harmonization is limited and sector-specific, leaving major areas, such as contract law, under national control **even within B2B and/or cross-border transactions**. This creates legal uncertainty, gaps, and overlaps, forcing businesses to navigate conflicting rules.

1.4 Persistent obstacles to B2B cross-border relations within the European Union

19. Rome I; one national law, need for a European one. One could object that Rome I Regulation 17 June 2008 (No 593/2008) has already addressed many issues. It has provided harmonized rules across EU Member States for determining the applicable law to contractual obligations in civil and commercial matters with cross-border elements.

Could such predictable choice of law have been sufficiently a game changer? More than 15 years of application suggest that this is not necessarily the case.
Indeed, express choice of law implies **difficult negotiations between contracting parties**, each being tempted to withdraw its own law simply because it is the one it knows best, especially in a multilingual environment where foreign European rules are difficult to access and understand.

Identifying the relevant law applicable to B2B transactions where Rome I is applicable may not be enough. Startups and scaleups crave **easy and user-friendly tools** to trade and expand, **regardless of where** and in which **language** they want to.

Such predictability can only be found within **truly European solutions** and not within national ones simply deemed applicable, expressly or not, to transborder B2B contracts.

20. Counterintuitive fragmentation on a single market; legal costs. The latter question raised in the mini study should be addressed. Since B2B transactions are often governed by fragmented national rules, "*How do businesses, including startups and scaleups, cope with legal fragmentation? What are the main obstacles businesses, including startups and scaleups, encounter when engaging in transactions with another business partner in the single market (and are these problems due to legal fragmentation)?"*

No prominent region or power in the world seems to have deliberately chosen or enacted trade through fragmented rules (see II).

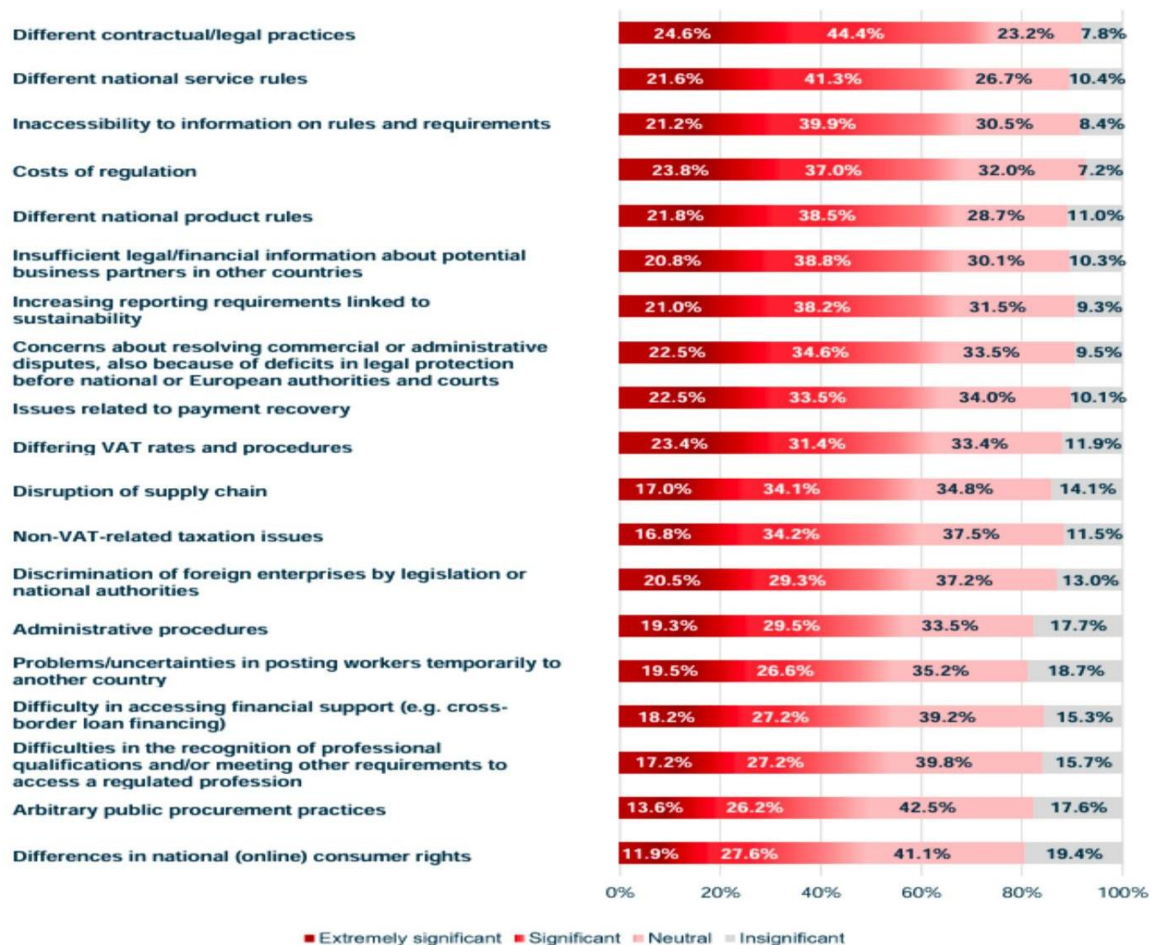
It is indeed extremely counterintuitive that a single market could accommodate in the long run 27 different B2B regulations on prominent aspects of business law, especially where a single currency currently matches 21 Member States since Bulgaria joined.
The current fragmentation is **not a choice**, nor the result of any rational or academic thinking. It is an **unwelcome consequence** of the jurisdictional competition between the EU and member states and a wrong general feeling that European business law was somehow already unified. The latter feeling seemed widely spread among member state officials, possibly because numerous reference books by scholars of EU legislation are entitled "European business law", even though they do not deal with major issues of commercial law but mostly with competition, supervision or intellectual property.

21. Main obstacles. An in-depth analysis requested by the JURI Committee of the European Parliament has identified major obstacles to cross-border trade in Europe (e.g.: Apostolos THOMADAKIS, Centre for European Policy Studies (CEPS), J. Scott MARCUS, Centre for European Policy Studies (CEPS), Identification of hurdles that companies, especially innovative start-ups, face in the EU justifying the need for a 28th Regime – CEPS, spec. 3 and seq.).

A prior survey made by Eurochambres is very enlightening: this report presents the findings of a comprehensive survey, conducted with the support of national chambers of commerce and industry between 4 September and 20 November 2023, which captures the insights and perspectives of 1004 business owners and entrepreneurs across all EU member states; 55% of survey respondents are service providers and the remaining 45% are producers of goods. In terms of company size, 87% are SMEs while 13% represent large companies and, when it comes to cross-border activities, 67% of the respondents make use of the single market while 18% do not yet trade cross-border but would like to. (Eurochambres 2024 Single Market Survey 2024-Eurochambres-Single-Market-Survey-Full-Report.pdf),

The following developments are based on these studies.

Figure 3: Ranked list of single market obstacles as viewed by EU firms (2024)



Source: (Eurochambres, 2024, p. 4)

Business owners claimed for instance the following: “Freedom of movement in the provision of cross-border services is obstructed by restrictive practices.” “Reporting obligations are time-consuming and a killer for SMEs.” “Territorial supply constraints limit the free movement of goods.” “The fragmentation of rules related to packaging is a concern.”

22. (i) Diversity of contractual B2B practices and rules. The **main teaching** of Eurochambres Survey is the following: "***Businesses are particularly concerned with heterogeneous rules on contracts, guarantees, remedies and litigation in cross-border sales followed by complex rules, terms and conditions in the provision of both goods and services****. The uncertainty and complexity associated with obtaining information and understanding different regulatory requirements, especially for SMEs, as well as diverging technical standards undermine the very purpose of the single market. Most of these barriers had already ranked highly in the 2019 report."*

However, multinational companies and **major players seem better accustomed to this fragmentation** and are precisely tooled to overcome its obstacles, thanks to prominent legal advice and assistance from international law firms that have legal skills under various legal jurisdictions.

The 2024-Eurochambres-Single-Market-Survey-Full-Report.pdf suggests that large companies feel that the 1st obstacle will be the "increased reporting requirements linked to sustainability",

whereas all other companies described the **existence of different contractual and legal practices as their first issue.**

Navigating between 27 legal environments may even have become a competitive advantage for multinational companies whereas it is generally very challenging for very small and small businesses to **sustain such legal costs**.

The latter **do not have the financial means** to secure their contracts on cross-border matters; some may even prefer to stay national and avoid scaling up if it implies cross-border legal issues deemed uncertain and thus unpredictable.
A counterexample arises from successful companies that prefer to leave for the US when they grow substantially to benefit from a 330 million people integrated market, without even considering the potentiality of the EU's single market of almost half a billion.

It is likely that fragmentation of the Single Market is a notable cause for **unicorns' exodus** to the USA or elsewhere.

23. (ii) Difficult access to (re)financing. It remains excessively difficult for SMEs. Pre-IPO venture capital in the EU is highly underdeveloped. More than 70% of venture capital (VC) funding in the EU is concentrated in only four Member States (Germany, France, Sweden, the Netherlands) (Thomadakis, Lannoo and Arnal, 2024). The legal heterogeneity of fund structures, shareholder rights, and exit conditions discourages cross-border capital flows.

These authors have identified the main causes as follows:

- excessive dependence of EU companies on bank loans rather than other means of financing;
- weakness of equity and bond markets in the EU;
- weakness of pre-IPO (initial public offering) financing, defined in our case as consisting of venture capital (VC), private equity, business angels, and crowdfunding;
- the weakness of the capacity to issue initial public offerings (IPOs), which constitute an essential means of monetizing promising start-ups;
- the practical inability of pension funds and insurance companies to participate in investments other than the safest ones.

Regarding access to financing, an average American company backed by venture capital receives nearly five times more capital than its European counterpart, while American companies supported by private funds receive 20 times more than those in the EU. Structural obstacles in EU capital markets and limited exit options further exacerbate this gap.

24. (iii) Costs of regulation. Excessive compliance costs due to the accumulation of European and national requirements and, consequently, regulatory fragmentation entail major costs: regulatory complexity and administrative burdens continue to weigh heavily on companies. Companies face an accumulation of overlapping European and national requirements, and high compliance costs, particularly in the areas of labor law, data protection, and company law. An EIB survey shows that 28% of EU start-ups devote at least 10% of their staff to regulatory tasks, which underscores the extent of the burden borne by small innovative enterprises.

Cross-border establishment remains costly and inefficient, with companies often compelled to duplicate compliance and legal operations in each Member State where they establish themselves.

25. (iv) Legal uncertainty. Legal uncertainty, particularly in matters of insolvency, labor law and economic law, is detrimental to long-term planning and investment. Although numerous areas of economic activity are governed by European directives, their **transposition and implementation at the national level vary considerably**. This is the reason why some suggest as a first solution to "***Eliminate the usage of directives***" (The Constitution of Innovation). Transposition or gold plating issues indeed bring unpredictability for companies seeking to expand beyond borders, as the same European rule may be interpreted in various ways depending on the Member States, and the options left to them also generate legal uncertainty.
Legal uncertainty also arises from the slowness and low degree of predictability of regulatory updates. The time between the Commission's proposals and their transposition and implementation at the national level, as well as frequent changes in interpretation by courts and authorities, hinders long-term planning. The **absence of centralized or uniform dispute resolution mechanisms** further reinforces fragmentation and contributes to a perceived lack of legal clarity across borders.

Insecurity ultimately arises from the persistent difficulties affecting insolvency proceedings in Europe.
Cross-border investments within the EU are hindered, as investors cannot be certain of recovering a fair share of their investment in the event of the bankruptcy of an innovative company.

2. International Overview

26. Need for an international overview, not for an EU Federation. It seems useful on such a structuring matter to adopt a comparative business law perspective: **how do different countries, especially very populated or vast ones, fight fragmentation and deal with the issue of integration of business law**?

The latter examples – which in no way pretend to be exhaustive – may therefore be of some use:

- USA;
- Canada;
- China;
- India;
- OHADA.

The comparisons with states like the USA, Canada or India are in no way meant to suggest that the European Union should be transformed into a federal state.
These countries have been chosen solely because they are **vast** (EU being 4.2 million km2 wide), often very populated and deal with **diverging private laws** at the state or provincial level.

Insofar, they face similar questions as the EU when deciding which aspects to cover by uniform rules.
The choices they have made in this regard can therefore be instructive for the European legislator.

2.1 Within the United States

27. UCC / US Code of Federal Regulations: 2 codes for a Common law superpower. The United States is a federal republic of 50 states comprising around 340 million inhabitants. World first economic and financial power, the US have addressed the issue of legal fragmentation inter alia thanks to UCC and US Code of Federal Regulations.

Developed in 1942 in partnership between the *Uniform Law Commission* and the *American Law Institute* (https://www.uniformlaws.org/acts/ucc), the *Uniform Commercial Code* was finalized in 1949 under the supervision of Professor Karl Llewellyn. Updated regularly, the UCC contains uniform rules of commercial law proposed for adoption by States. These have been adopted almost entirely by all the States, with the notable exception of Louisiana. The objective of the UCC was thus to respond to the difficulty encountered by North American companies related to the combination of different commercial laws of States, particularly in terms of sales, loans, guarantees and negotiable or financial instruments. Although its nine "articles" - headings of chapters in fact - do not cover all areas of commercial law, the UCC certainly contributed to the emergence of a wide federal market (Allan Farnsworth, "The Uniform Commercial Code of the United States of America", RIDC, 1963, p. 733; D. Tallon, "The Uniform Commercial Code of the United States of America", RIDC, 1971, p. 617).

Article 1-103 clearly highlights the economic development objective of the UCC, stating that "*(a) The Uniform Commercial Code shall be interpreted and applied in a manner that promotes its underlying objectives, which are: (1) to simplify, clarify and modernize the law governing commercial transactions; (2) to permit the continued expansion of business practices by custom, usage, and agreement of the parties; and (3) to standardize the law among the different States*."
It is astonishing that the US, deemed to be a Common law country, has turned towards codification to promote growth and B2B transactions on its own market. Beyond the UCC, federal rules do organize key aspects of business law via the US Code of Federal Regulations and through Title 11 on Bankruptcy, Title 12 on Banks and Banking, Title 15 on Commerce and Foreign Trade or Title 17 on Copyrights, resulting in scalable market practices.

2.2 In Canada

28. Federalization of prominent business law issues in a common law combined with civil law environment. Canada is another interesting example since it combines both common law and civil law traditions at the provincial level on the 2nd most expansive area (9.985 million km2; population: 41.5 million inhabitants).
Although private law rules are generally provincial (with a Code civil du Québec for instance), federal law has been introduced to rule key aspects of business law such as, in particular, the law on the sale of goods, bills of exchange, personal property and securities.

Indeed, key aspects of business law have been federalized by the following Acts: Sale of Goods Act (1978), Bills of Exchange Act (1985), Personal Property Act (1993), and Securities Transfer Act (2007), the latter having been elaborated thanks to the Uniform Law Conference of Canada (ULCC).
This mix - provincial private law complemented by federal or uniform instruments - addresses fragmentation pragmatically while preserving legal diversity across provinces, offering instructive lessons for the EU where at least 3 Member States out of 27 are of common law tradition (Cyprus, Malta, Ireland).

2.3 In India

29. Federalization of prominent business law issues in the most populated country in the world. A further example is India, which is the most populated country in the world with 1.46 billion inhabitants and the 5th most powerful economy.
Different versions of common law apply throughout the 28 states and eight territories: to prevent this legal diversity from impeding trade, the federal legislator has unified a vast number of legal rules (contract law, negotiable instruments, trusts, cooperatives, corporate law, labour law, copyright, trademarks, and competition law).

Key statutes include: Indian Contract Act (1872); Negotiable Instruments Act (1881); Trusts Act (1882); Cooperative Societies Act (1912); Sale of Goods Act (1930); Industrial Employment (Standing Orders) Act (1946); Industrial Disputes Act (1947); Minimum Wages Act (1948); Companies Acts (1956; 2013); Copyright Act (1957); Trade Marks Act (1999); Competition Act (2002); Multi-State Co-operative Societies Act (2002).

2.4 In China

30. Federalization of prominent business law issues in the 2nd economy and 2nd most populated country. The People's Republic of China has both the 2nd economy and population (1.41 billion inhabitants) in the world; it is the 3rd biggest in size. It is a civil law country, where codification is deemed essential.

China's Civil Code was renovated in 2021 after years of discussion and consultation of experts worldwide: it currently governs all contracts - including B2B - within a comprehensive codified framework.

Complementary commercial statutes include the Company Law (1993), the Anti-Monopoly Law (substantially revised between 2008 and 2022), the Anti-Unfair Competition Law (2015), and the Enterprise Bankruptcy Law (2007).

Although China does not maintain a separate "commercial code", these instruments collectively provide uniform private-law baselines at the state level.

2.5 Within the OHADA Zone

31. Integrated business law to maximize economic growth. The Organization for the Harmonization of Business Law in Africa (OHADA) (Treaty of 1993: Chronology – OHADA) encompasses 17 Member States: Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Comoros, Côte d'Ivoire, Democratic Republic of Congo, Equatorial Guinea, Gabon, Guinea, Guinea-Bissau, Mali, Niger, Republic of Congo, Senegal, Togo (counting for 275 million inhabitants and over 8 million km2).
It unifies business law via "uniform acts"- akin to EU regulations - across ten areas: general commercial law, securities, cooperative companies, road carriage of goods, accounting harmonization, arbitration, insolvency, simplified recovery and enforcement, commercial companies and economic interest groups.

Article 1 of the Treaty of Port-Louis establishing the Organization for the Harmonization of Business Law in Africa (OHADA), adopted on October 17, 1993, states that "*the purpose of this Treaty is the harmonization of business law in the States Parties through the elaboration and adoption of simple, modern common rules adapted to the situation of their economies, by implementing appropriate judicial procedures, and by encouraging the use of arbitration for the settlement of contractual disputes*".

The field of business law has been expressly defined by Article 2 of the OHADA Treaty: "*For the application of this Treaty, all the rules relating to company law and the legal status of traders fall within the field of business law, the recovery of debts, securities and means of enforcement, the regime of reorganization of companies and judicial liquidation, arbitration law, labor law, accounting law, sales and transport law, and any other matter that the Council of Ministers may decide, unanimously, to include therein, in accordance with the purpose of this Treaty and the provisions of Article 8*".

The Preamble to the Treaty leaves no doubt about OHADA's ambition for economic development, the signatories stating that they are "*convinced that the achievement of these objectives presupposes the establishment in their States of a harmonized, simple, modern and*

adapted Business Law, in order to facilitate the activity of companies; aware that it is essential that this law be applied diligently, under conditions that guarantee legal certainty of economic activities, in order to promote their development and encourage investment".

As Kéba M'Baye, one of the fathers of OHADA, soberly stated to present the work accomplished, "*OHADA has an African origin and its purpose is simply economic*" (Kéba M'Baye, "The history and objectives of OHADA", Petites affiches, 13 October 2004, No. 205, p. 4).

The OHADA zone was meant to fight balkanization and uncertainty of business law to promote growth: "*Indeed, it is undeniable that legal balkanization and judicial insecurity were the key impediments to the economic development of the continent. Harmonizing economic laws and improving the functioning of judicial systems in Member States were therefore necessary to restore investor confidence, facilitate trade between countries and develop a vibrant private sector (…) the result is a huge work of legal unification in its Member States. OHADA is therefore an important tool for the development of business law, the creation of an integrated legal space conducive to a viable and lively economic space. OHADA can be a role model in Africa and beyond since the Caribbean countries have already implemented a similar project*." (General overview – OHADA).

32. Common Court of Justice and Arbitration. The Common Court of Justice and Arbitration (CCJA), headquartered in Abidjan, plays a major role within OHADA's legal landscape.

First, it provides for **coordinated justice at the regional level** by the Common Court of Justice and Arbitration, which **reviews decisions rendered by national courts**. CCJA acts as cassation judge in all disputes concerning matters falling under OHADA legislation.

Second, it enriches arbitral procedures available to business partners, with the assistance of the **Common Court**, which administers proceedings without acting as arbitrator, checks the quality of awards and gives them executory force (Achievements – OHADA).

With an integrated population of roughly 275 million, OHADA demonstrates how uniform acts and a supranational court can successfully overcome fragmentation in transnational commerce and help start-ups and scale-ups. **Its result is very similar to a codification of business law at the regional level with 10 legislative instruments** which provide for full unification, and not only for harmonization, contrary to what the H for "Harmonization" suggests.

3. Priorities

33. Prioritizing European optional tools for start-ups and scale-ups. Therefore, some of the analysis and suggestions made in the current study are inspired by the work carried out under the European Business Code (EBC) project.

The following will identify the optional tools or instruments that seem to be prioritized by the EU to address the obstacles identified above and enhance the integration of the Single Market. In this regard, one may refer to a study carried out for the European Parliament on the implementation of optional instruments in which Professors Bénédicte Fauvarque-Cosson and Martine Behar-Touchais retained the following definition of the optional instrument: "*there is an optional European instrument when the subjects are given a choice between, on the one hand, a system implementing at least in part a national law or a regime resulting from an international convention binding the Member State, and, on the other hand, a European instrument, of relative autonomy, resulting from secondary legislation or from an international convention concluded solely between Member States of the European Union and capable of benefiting all the Member States of the Union, regardless of the fact that the two systems in question have a different territorial scope, since the use of one precludes the use of the other*" (TEE_vol_5_sommaire_et_resume_de_l'etude.pdf).

Considering the above, some top priorities may be highlighted that could be a game changer for the Commission's contribution to EU business growth, especially considering the Savings and Investment Union.

These tools offer a coherent body of solutions and are somehow interdependent:

- Harmonizing key aspects of B2B contracts (fighting unfair terms) and introducing a European integrated partnership contract (harmonizing franchises, concessions and brand licensing);
- European loans (financing growth);
- European guarantees (securing creditors whether in an in bonis or insolvency context);
- European transfer of securities (fluidifying the European securities market);
- European assignment of claims and factoring (refinancing short term claims);
- European fiducia (introducing a wide-function business tool);
- Harmonizing dispute resolution (allowing for alternative methods and arbitration).

3.1 B2B contracts in general (EBC Project and beyond)

3.1.1 Current obstacles

34. Business need and current legal issues. Harmonization of contract law in Europe has previously failed, affecting on a long-term basis the scope and extent of EU acquis in private law. It is true that the principle of party autonomy allows to submit business contracts to a single national law (see Article 3(1) Rome I Regulation on the law applicable to contractual obligations). However, the need remains for a minimal harmonization of key aspects of contractual law.
There are several reasons for this.

First, since parties do not have a clear preference for any Member State law, the law that is chosen for transactions in the internal market often diverges from one contract to the other. This means that parties still need to deal with the plethora of national laws, resulting in increased transaction costs and reduced efficiency gains for parties.

Second, where the parties agree to a specific law, it is often the law of a non-Member State. When doing business in the intra-EU market, market actors prefer English and Swiss law over the laws of the 27 Member States (see Gilles Cuniberti, 'The International Market for Contracts: The Most Attractive Contract Laws', 34 Northwestern Journal of International Law & Business 455, at 472 (2014)). This provides legislators, tribunals and lawyers in England and Switzerland with an outsized influence over the rules and disputes in the EU.

Finally, not all rules can be selected. Different national rules do exist, including mandatory ones like those on unfair terms (for instance, Article L 442-1 I 2° of the French Commercial Code addresses significant imbalance). Since they concern the conclusion of the contract, they also set limits to the choice of law. The EU has already started to harmonize B2B unfair terms control in P2B Reg, DSA, DMA and Data Act, and in special rules on abusive commercial practices between professionals in the food sector (see n°11). More needs to be done.

3.1.2 Rethinking European B2B contract law

35. Should old harmonization "wounds" be reopened? Old "wounds" resulting from the failures to harmonize European contract law (above n°8), either directly or through sales law, should not be reopened without caution.

However, some **new arguments** could be raised in this respect.

Limiting the scope to a sole B2B approach could be **less traumatic** for Member States, possibly still eager to keep full control of their respective contractual laws **outside of B2B relations**.

It could also be justified by the current **geopolitical context,** which is more aggressive than one or two decades ago, and the urgent need to **reduce transaction costs** and legal uncertainty under the new **competitiveness compass**.

Last, it would offer a common European contractual ground which would considerably help the implementation of any contractual matters under the 28th Regime initiative: **contract law** is

indeed no less than the **legal syntax of most transactions or special transactions**. If this syntax were never to be harmonized, startups and scaleups would keep **"speaking" on different transaction terms**. Since Roman times, contracts are - together with goods and legal persons - one of the 3 major legal "pillars" (described by Jean Carbonnier) of any private law, since transactions are always carried out by persons exchanging goods and services by contracts.

36. Discussing the scope of B2B contract law: some or all of it? Mandatory provisions, unfair terms, cross-border relations. An effective optional regime in B2B contract law should be **autonomous**, self-sufficient, with a comprehensive set of rules to minimize reliance on national law (conclusion, execution, remedies, etc.).

Nonetheless, Member States may object to the implementation of an independent optional self-sufficient regime, which could result in national law being increasingly reduced in substance.

Limiting the application of the European regime to cross-border relations could therefore **help** avoid competition with Member State contract laws and address concerns regarding their contractual traditions.

But even as an optional framework, a European B2B contract law would need to **contain its own mandatory provisions, for instance to ensure the protection of the weaker professional party**. Ideally, any gaps or interpretations should be addressed within the instrument itself, rather than referring to external systems. And **the frontier between contractual common law and special contract law is not always so easy to draw:** for example, the error on profitability is admitted by French case law on franchising (if the overly optimistic forecasts have been established by the franchisor).

Despite this ideal, it must be remembered that the CESL Proposal failed partly because of its too broad scope and incomplete weaker party (consumer) protection (it was perceived as such, even though it was very protective of the consumer: cf. M. Behar-Touchais, -*Comparison of mandatory consumer protection provisions in the Common European Sales Law proposal and fourteen national laws (*BG, CZ, DK, EL, IE, CY, LV, LT, LU, MT, AT, SI, SK, FI), 2013 (Tender No JUST/2012/EVAL/CT/0123/A4, Study ordered by the European Commission).

A key aspect of harmonization could be **to fight unfair terms** (**introducing for instance black, grey and/or whitelists**) on a level playing field in the EU regardless of the different mandatory national laws (including "*lois de police*") and **without unreasonably attempting to freedom of contract.**

Beyond unfair terms, **uniform rules on formation (defects of consent, offer/acceptance), execution and common remedies for breach would most profitably be harmonized in a strict B2B environment**.

The latter would bring **predictability** and security to startups and scaleups in cross-border transactions.

37. Fragmentation on the "imbalance" issue. The disparity between national legislations on these points remains significant, creating a lack of trust between European countries. This contrasts with the level of cooperation that exists within the European Competition Network (ECN) and between consumer protection authorities under the CPC Regulation.

Let us take the example of imbalance in B2B contracts.
Disparities exist even when the substantive rules appear relatively similar. We will compare French and Belgian law.

In France, significant imbalance in B2B relationships may be sanctioned under Article L. 442-1, I, 2° of the French Commercial Code: "*I. – Any person engaged in production, distribution or service activities shall be liable for damages caused by: (…) 2° Imposing or attempting to impose obligations on the other party that create a significant imbalance in the rights and obligations of the parties.*"

Despite the somewhat awkward drafting of this provision, the victim may obtain the nullity of the clause. Article L. 442-4 of the French Commercial Code provides that: *"…the party victim of the practices referred to in Articles L. 442-1, L. 442-2, L. 442-3, L. 442-7 and L. 442-8 may obtain the annulment of the unlawful clauses or contracts and request the restitution of undue benefits."*

By contrast, the Belgian Law of 4 August 2019, *"amending the Code of Economic Law with regard to abuses of economic dependence, unfair terms and unfair market practices between businesses"*, sanctions manifest imbalances.
Article VI.91/3, § 1 of the Code of Economic Law states that:
"Any term in a contract concluded between businesses is unfair when, alone or in conjunction with other terms, it creates a manifest imbalance between the rights and obligations of the parties."

Furthermore, Article VI.91/3, § 1, paragraph 3 specifies that, *"provided that these terms are drafted in a clear and understandable manner,"* the assessment of unfairness does not relate to the definition of the main subject matter of the contract or to the adequacy of the price or remuneration in relation to the goods or services supplied.

At first sight, "significant imbalance" and "manifest imbalance" may appear synonymous. However, the two frameworks differ in several respects:

- **Scope of sanctionable behaviour**: the French text sanctions *practices* creating a significant imbalance, covering both contractual terms and behaviour. The Belgian text appears to cover only unfair terms.

- **Submission requirement**: the French regime targets situations of economic submission; the Belgian text does not include this notion.

- **Control of pricing**: French law allows excessive pricing to be assessed through significant imbalance; Belgian law does not.

- **Black and grey lists**: French law contains no such lists, whereas Belgian law includes both a black list (Article VI.91/4) and a grey list of terms.

The greatest difference lies in sanctions and enforcement:

Under Belgian law (Article VI.91/6), *"Any unfair term is prohibited and void. The contract remains binding on the parties if it can continue to exist without the unfair terms."*

This is a rule of relative nullity: only the party on whom the unfair term was imposed may invoke or confirm the nullity. The use of unfair terms may also lead to a fine of €26,000 to €250,000 where the offence is committed *in bad faith*.
Under French law, significant imbalance may be invoked not only by the victim but also by the Minister of the Economy, who, according to the CJEU, exercises public administrative powers and enjoys exceptional investigative and enforcement prerogatives (CJEU, *Eurélec*, 22 December 2022, Case 98-22).

Both the victim and the Minister may seek annulment of the clause and cessation of the unlawful practice. The victim may also claim damages.

The Minister may further request that the company be ordered to pay a civil fine "not exceeding the highest of the following amounts" (Article L. 442-4):

- €5 million;
- three times the amount of the unduly received or obtained benefits;
- 5% of the turnover generated in France, excluding VAT, during the last financial year.

A powerful contracting party facing a maximum fine of €250,000 in Belgium may be inclined to include a clause it knows to be unfair. Conversely, facing a potential €5 million fine (or more) in France acts as a strong deterrent. The Belgian regime is therefore of limited effectiveness, while the French regime may be considered overly intrusive.
This situation encourages the relocation of business activities to jurisdictions with the least stringent national laws. Negotiations are outsourced to those countries, and contracts are made subject to their legislation.

However, such practices have triggered reactions that run counter to the European spirit.
They reveal, on the one hand, distrust toward countries with lighter sanctions and, on the other, distrust from those countries toward attempts to impose extraterritorial application of foreign legislation.

First, this has intensified the temptation to treat national mandatory rules as overriding mandatory provisions in nearly all circumstances - contrary to CJEU case law, which requires a strict interpretation of that concept (CJEU, 17 October 2013, *Unamar*, C-184/12, §49; Recital 37 of the Rome I Regulation).

For example, in France, the Descrozaille Law of 26 March 2023 was adopted to counteract the relocation of commercial negotiations abroad.
Second, it has fostered the extraterritorial application of national law. The same Descrozaille Law provides that any agreement between a supplier and a buyer relating to products or services marketed in France is subject to French rules.

It is time for harmonisation in this area. And if full harmonisation seems premature, the creation of a 28th regime to which companies could voluntarily adhere - potentially even using it as a commercial advantage in certain markets - may be an appropriate intermediate step.

3.1.3 Addressing territorial supply constraints (TSCs) issues

38. Business need and current legal issues on TSCs. The absence of harmonization of the legislation of the Member States regarding supply contributes to the persistence of territorial supply constraints (TSCs). TSCs are referred to, within the EU, when the **supply conditions offered by suppliers to distributors differ depending on the Member States in which the latter are established or in which the products or services are marketed.**

This **differentiation of contractual terms** produces an **effect comparable to a differentiation of laws** (contractual differentiation is moreover sometimes the result of legislative differentiation), insofar as a contractual relationship is governed both by the *law* and by the *contract*.

That is why a decompartmentalized common market would require both a harmonization of laws and a prohibition of discrimination in contractual terms between distributors on account of their place of establishment or, more reasonably, would prohibit suppliers from refusing to supply distributors placing orders in states where they are not established and where the supplier's terms and conditions are more favorable. This is certainly an infringement on contractual freedom, but it is a decisive issue for the creation of an internal market. Is it possible to picture a scenario where practices commonly seen across the EU might also become routine within an individual Member State?

Nowadays, the **main instrument for combating TSCs is competition law**. Several recent cases (see in particular the Mondelez case, 2024; the AB InBev case, 2019) have made it possible to apprehend and sanction, in light of the prohibition of cartels and abuses of dominant position, practices consisting in one way or another of partitioning markets by prohibiting or limiting the possibility of exporting goods to another Member State: price differentiation, refusal to supply or quantitative limitation, differentiation of products and packaging, in particular.

For several years, distributors have been confronted with compartmentalization strategies implemented by their suppliers, with the aim of enabling the latter to increase their margins by selling their products at higher prices in certain countries, to the detriment of consumers. Some major international suppliers refuse to supply distributors who wish to source products from other EU countries than the country in which they are established.

Although effective, **competition law** nevertheless constitutes an **insufficient** instrument.
Firstly, it addresses agreements and unilateral conduct by undertakings in a dominant position, but not unilateral conduct by undertakings not occupying such a position. It would certainly be possible to create other anti-competitive practices, but this would require an amendment to the Treaties. Furthermore, although French law penalizes another unilateral practice, namely abuse of economic dependence, this practice is almost never used.

Secondly, and as regards undertakings in a dominant position, it should be noted that such a position is assessed on the *market* (understood as encompassing substitutable products and services), without taking into account the *exceptional notoriety of a product* for which supply is crucial.

Thirdly, anticompetitive practices are, in principle, sanctioned only if they *substantially* restrict competition, which, in practice, leaves aside the practices of undertakings that do not have a significant market share.

Fourthly, the implementation of competition law generally presupposes the *allocation of significant resources* by victims, authorities, and courts.

That is why **other areas of law should be mobilized, alongside competition law, to effectively combat TSCs**.

According to what technique? According to what logic?

We believe that the most effective technique would be to adopt an approach based on the nature of the practice itself ("*per se*"), rather than on its effects, as the latter often leads to legal uncertainty. While the effects-based approach is natural in competition law, due to the underlying economic analysis required, it is not appropriate when seeking to break down barriers between national markets.

We are not convinced that an instrument designed to combat unfair practices (e.g. Directive (EU) 2019/633 of 17 April 2019 *on unfair trading practices in business-to-business relationships in the agricultural and food supply chain)* is the most appropriate solution. Indeed, it is not a question of combatting an imbalance of power between the parties involved, but rather, once again, of opening up national markets.

On the other hand, an instrument such as Regulation (EU) 2018/302 of 28 February 2018 *on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market* seems entirely appropriate. This is a text whose very purpose is to break down barriers between markets. And there is no reason why this logic should be fundamentally different depending on whether it concerns online commerce or "traditional" commerce, or whether it concerns B2C or B2B relationships.

Such a **law** should include at least **two prohibitions**.

Firstly, as a continuation of what has just been stated, this law should **prohibit a supplier from supplying a distributor on the basis of general terms and conditions that it offers to specific distributors within the EU**. In other words, a supplier should not be able to impose such general terms and conditions on a distributor solely on the basis of its place of establishment. **Such a prohibition should be a *per se* prohibition, to be more effective.**
Secondly, this law should **prohibit States**, in this instance, from creating legal barriers by subjecting supply relationships to specific rules that make market entry by foreign suppliers excessively difficult. Indeed, it cannot reasonably be expected of suppliers, especially SMEs and *a fortiori* micro-enterprises, to comply with as many legal systems as there are Member States, all the more so as the requirements of these laws may be contradictory. The case of French legislation is, in this respect, instructive and has been criticized by legal scholars (see in particular M. Behar-Touchais and C. Grimaldi, "The Descrozaille Law, known as 'Egalim 3', or the victory of suppliers over distributors," JCP E, 2023, 1169).

In sum, TSCs remain a reality to this day. **The full realization of the common market would require their disappearance.** While European competition law contributes to this, it is insufficient. The other existing texts are not sufficiently ambitious.

3.1.4 Introducing a European Integrated Partnership Contract (EBC Project)

39. Economic importance and current legal issues. Integrated or commercial partnerships such as franchising, concessions and trademark licensing represent tens of thousands of businesses and **tens of billions of euros** in turnover across the EU.

They are core distribution and brand-development vehicles.

However, **national laws diverge on public-policy rules and pre-contractual information** (e.g., some Member States require a pre-contractual information document; others do not; the content also varies).

- These contracts play a very important role in the economy. These contracts are most often concluded by small businesses.
- This contract is the one that will necessarily be cross-border, if the head of the network wants to expand its network in Europe.
- In a European distribution network, the head of the network needs to have distributors in every country if its network is expanding.
- However, there is still no harmonized European legislation, particularly concerning unfair terms and unfair business practices between companies.
- This is an area where there are many mandatory rules, and these rules differ from one country to another.
- In this way, either the head of the network decides not to develop its network in another country, or it contracts with a master franchisee or a master concessionaire, who will then enter into internal contracts with local distributors.

In 1972, the European Franchise Federation established a European Franchise Code of Ethics to provide guidance on responsible practices for commercial format franchises. This Code of Ethics has been revised over time to align with evolving business standards. The Federation includes 17 member associations, each representing franchisors from various European nations. Franchisors associated with these organizations are affiliated with the FEF and are obligated to comply with the Code of Ethics.

The introduction of this **Code of Ethics (which is not a Code of laws relating to franchise)** highlights the necessity for franchisors or licensors to operate under a unified set of principles when conducting business across Europe. **It would be preferable for all of them to have a 28th regime rather than a code of good practices**.

It is important to note that national legislation across Europe contains varying public policy requirements, many of which are mandatory. For instance, pre-contractual information documents are not universally required: Germany does not mandate them, whereas France, Belgium, and Spain do. Furthermore, where such documentation is required, the specific content often differs from one country to another.

40. Various examples

Example 1. A franchisor establishes a network spanning France, Belgium, Germany, Spain, and Italy. It stipulates clauses regarding contract termination and excludes any compensation for the distributor unless the termination is due to a fault on the part of the franchisor.
This could conflict with the Belgian law of July 27, 1961 (amended by a law of April 13, 1971), which provides for a special regime for the termination of exclusive sales concessions of indefinite duration (Faelli, T., Fierens, J.P., Griess, S., Mottet Haugaard, A., "La loi du 27 juillet 1961 relative à la résiliation des concessions de vente exclusive à durée indéterminée", chronique de jurisprudence (1997-2007), collection Les Dossiers du Journal des Tribunaux, Larcier, 2008). In Belgium, the franchisor must provide reasonable notice (which, according to case law, can be very long) or fair compensation to be determined by the parties at the time of contract termination. However, Belgian law also provides for "supplementary compensation for loss of goodwill" when the termination is initiated by the franchisor and in the absence of serious misconduct by the franchisee.
This compensation can represent a very significant sum, as it includes the added value of the customer base remaining with the franchisor after termination of the contract, the expenses incurred by the franchisee that would benefit the franchisor after the contract's expiration, and all severance pay owed by the franchisee to the staff it must lay off. The franchisor simply needs to require its franchisee to choose the optional European regime for this Belgian law (which seems atypical in Europe) to no longer apply, and for the contract termination conditions to be uniform throughout the network.

However, many examples could be drawn from atypical national laws (for example, French ones), which can discourage an operator from expanding outside its country of origin, whose laws it is familiar with.

A 28th regime to which the parties could submit would allow them to be subject to a public order (European police law) identical for the whole of the EU.

Example 2. The control of unfair terms and abusive practices differs. The issue of undue economic dependence does not exist everywhere. You can use certain clauses in some countries but not in others. Choosing the applicable law doesn't help you, because these laws are often simply police regulations. You will need to consult a lawyer in each country. The cost is prohibitive for small businesses.

Example 3. **In France, when a network imposes maximum resale prices (a practice that is, in principle, lawful), the network head may nonetheless be classified as a "branch manager". This status allows the business operator to benefit from labour-law protections in their relationship with the network head, while remaining an independent entrepreneur in their dealings with end-customers.**
A network head who has structured their system in Belgium - using clauses designed to avoid any risk of being classified as a branch manager - may be unaware of this French rule. If they later decide to expand their network into France, the consequences may be significant and financially burdensome.

41. Relevant provisions from the EBC Project (abstract). A proposal has been made in Book 2 on Market law introducing an integrated partnership agreement that would cover franchising, concessions, and brand licensing.

The integrated partnership agreement would be **innovative** since it establishes a **minimal common regime for certain contracts, such as franchise, concession, and trademark licence agreements**. Conversely, the franchise agreement will also be subject to specific rules.
A European common set of rules would clarify and harmonize its legal regime with rules such as:

- requirement for a **written agreement,** verbal agreements being null and void for the sake of legal certainty. This protects distributors who may otherwise rely on verbal arrangements that often lead to disputes;

- **exclusion of labor law**: distributors do need safeguards; however, full labor law coverage could disrupt economic contract balance (e.g., in France: Article L 7321-2 regarding branch managers);

- **prohibition for the network head from preparing the provisional budget**: in the event of a significant forecasting error, the distributor may seek remedy from the insured professional responsible for preparing the forecasts, rather than automatically pursuing recourse against the franchisor, as is currently standard practice; this approach should also be applied to the **market statement**, which ought to be completed by an independent party rather than the contracting party; given that these agreements typically span five to seven years, this requirement should not constitute an undue burden.

Article 2.2.1.1.1: Definition of integrated partnership contract

1. An integrated partnership is a contract by which a partner, known as the network head, grants its co-contractor, known as the distributor, who acts in his own name and on his own behalf, the right to sell products or provide services under a common brand name, and may undertake to transfer its know-how or provide commercial or technical assistance.
2. In particular, franchising, concession and trademark licensing agreements, where the trademark is used as a common brand name, may qualify as integrated partnerships. …

3.2 European loans (EBC Project)

3.2.1 Current obstacles

42. Business need and current legal issues. Startups and scaleups need stable, predictable and user-friendly financing tools that can support rapid growth and cross-border expansion. However, divergent national rules governing B2B lending generate fragmentation and legal uncertainty, including difficulties in identifying applicable overriding mandatory norms, and significantly complicate cross-border financing structures.

The persistence of fragmented national legal frameworks governing B2B loan contracts continues to hinder the efficient functioning of the internal market for corporate finance. While business-to-consumer (B2C) credit – such as consumer loans offered by banks – has been extensively integrated through EU legislation, this is not the case for business-to-business (B2B) loans, which remain largely regulated at national level.

As a result, divergent rules on contract formation, enforceability, interest regimes, default events and remedies increase legal uncertainty and transaction costs in cross-border lending.
This fragmentation disproportionately affects SMEs, startups and scaleups. These companies typically have limited bargaining power, reduced access to legal resources, and a strong reliance on flexible debt instruments. Faced with heterogeneous national regimes and qualification risks, they are often reluctant to engage with non-domestic lenders, even where competitive financing is available.

Fragmentation is further exacerbated by the absence of a harmonised EU approach to **intercompany and non-bank lending**. In many Member States, intercompany loans and loans granted by non-bank lenders are broadly permitted under general contract law. In others, most notably France, such lending is treated as a strictly framed exception to a national banking monopoly.

These divergences create additional legal unc**ertainty for cross-border intercompany credit and alternative lending**. Companies and investors willing to provide debt financing across borders face inconsistent assessments of the legality of loans granted by non-bank lenders, differing qualification risks and heterogeneous restrictions. This discourages cross-border provision of debt financing, limits competition among lenders, and contributes to the continued segmentation of European capital markets, despite the recognised economic importance of intercompany credit for corporate financing.

As repeatedly acknowledged in the context of the Capital Markets Union and the Savings and Investments Union, overcoming legal and regulatory fragmentation is essential to facilitate the free movement of capital and improve access to finance across Member States. **A European B2B loan contract would directly contribute to this objective by providing a uniform and predictable contractual framework applicable to loans granted by both bank and non-bank lenders**, without harmonising prudential or licensing regimes. By reducing contractual uncertainty, it would enable lawful cross-border intercompany credit and alternative lending to develop more efficiently.

Existing market standards do not adequately address these needs. The Loan Market Association (LMA) models (LMA Loan Market Association - the authoritative voice of the EMEA market), which are widely used in the financial industry for syndicated loans, provide highly

sophisticated documentation designed for large-scale transactions involving multiple lenders. These templates typically assume loan amounts exceeding tens of millions of euros and include extensive provisions on lender coordination, reporting and covenants that are irrelevant or excessively complex for early-stage companies seeking smaller funding rounds. As such, LMA models are ill-suited to the practical realities of startups and scaleups.
In this context, a European B2B loan contract tailored to the needs of SMEs, startups and scaleups would fill a critical gap by offering a simple, standardised and legally secure instrument capable of supporting cross-border financing and fostering a genuinely integrated European market for corporate debt.

3.2.2 Financing startups and scaleups through a European B2B Loan

43. Relevant and key provisions from the EBC Project (abstract). Under the EBC Project, a European B2B loan has been suggested in Book 8 whose main characteristics are the following:

1. The European loan is a contract where a professional lends funds to another professional, with the regime applying only if expressly chosen by the parties, and it supersedes national law within its scope.

2. The regime is optional, indivisible, and allows contractual freedom, but national supervisory, tax, and accounting rules still apply.

3. The contract is formed by mutual consent, with pre-contractual information duties for the lender, and the total cost (including all fees) must be disclosed to the borrower.

4. The provisions cover key aspects such as provision and repayment of funds, currency choice, interest calculation, early repayment, and remedies for non-performance.

The main contribution is to provide a harmonized, flexible, and transparent legal framework for cross-border professional loans in the EU, promoting legal certainty and contractual autonomy.

Chapter 1: Financing Operations
Section 1: The European loan
§ 1: Concept, scope of application, general principles
Article 8.2.1.1.1.1 - Concept
A European loan is a contract by which a professional makes funds available to another professional.
The loan may bear interest or be interest-free.

***Comment**: The definition of a European loan is based on an economic criterion. It covers both promises to lend and the loans themselves. Characterizations under national law do not apply.*

Article 8.2.1.1.1.2 - Selection
1. The regime on the European loan only applies if the parties have chosen it. The choice must be express. It is not subject to any particular form.
2. The choice can be made at any time. The rights of third parties are not affected by a change of regime.
3. A partial choice of the European loan regime is excluded.

***Comment**: The European loan regime is optional. The rules of national law remain applicable unless the parties have expressly opted for it.*

The second paragraph is inspired by the Rome I Regulation (article 3 para. 2). The European loan regime is a whole. It is not possible to apply the European and national rules in part and selectively. This does not exclude the possibility to deviate from certain provisions by exercising contractual freedom (see article 8.2.1.1.1.5).

Article 8.2.1.1.1.5 – Freedom of contract

The parties may adapt the European loan regime, subject to the conditions set out in this section.

***Comment**: The choice of the European loan regime leads to the applicability of its provisions.*

The parties are free to adapt the rules on the European loan to their needs.

3.3 European guarantees (EBC Project)

3.3.1 Current obstacles

44. Business need and current legal issues; preventing "conflits mobiles". Without personal and real guarantees, **no financing is possible**, whether national or made through a European B2B loan. Neither banks nor non-bank lenders are willing to fund startups and scaleups without reliable security rights and predictability as to their effectiveness, both in an in-bonis and insolvency context.

Yet, the legal framework governing B2B security rights remains highly fragmented across the European Union.
Divergences relating to the creation, qualification, opposability and enforcement of security interests would create fewer difficulties if parties could freely choose the applicable law. However, unlike contractual obligations, property law is not subject to party autonomy. In the European Member States, it is the *lex situs* which determines questions of property law with respect to immovables and movables alike.

Applied to security rights in property that moves across borders, the *lex situs* rule leads to what is known as a **"*conflit mobile*".**

Example 1. If, for example, a security right is created while the collateral is in state A and if enforcement is sought after the item has been brought to state B, two different sets of property law rules have to be applied consecutively: **the creation of the security right is subject to the laws of A but the rights which the secured party has as against competing creditors are to be determined by the laws of B**. Evidently, this will lead to problems where the two sets of rules differ – especially wherever the collateral is moved from a jurisdiction less strict in attitude to a stricter one.

The differences with respect to the substantive laws combined with the rules of private international law frequently lead to a **discontinuity of security rights once the collateral moves across borders**. There are numerous decisions by courts of European Member States where secured parties suffered a complete or at least partial loss of their security rights since the collateral was moved from one Member State to another. It goes without saying that this situation is antithetical to the concept of an internal market. This is why it has even been suggested that the present situation may in certain circumstances violate the principle of free movement of goods and services if it leads to the loss of a security right that had been validly created in the country of origin.
Thus, the latter rules must produce predictable effects with limited, necessary formalities while balancing borrower/lender interests.
Again, divergent national rules generate fragmentation and uncertainty (including difficulty identifying overriding mandatory norms) and complicate cross-border structuring.

Against this background, European B2B guarantees designed to accompany a European B2B loan would represent a major improvement. Without harmonising property law as such, an optional European regime could provide standardised security instruments producing predictable effects with limited and proportionate formalities, while balancing lender and borrower interests.

In addition to real securities, **personal guarantees** such as suretyships are a key component of B2B financing, particularly for startups and scaleups **with limited assets**. However, national rules protecting guarantors diverge significantly across Member States, creating legal uncertainty and discouraging cross-border use. These divergences concern, in particular, validity requirements, information duties, proportionality tests and the scope of mandatory guarantor protections.

Example 2. A personal guarantee granted by a company director may be readily enforceable under one Member State law if clearly drafted, while under French law it may be subject to strict mandatory rules on proportionality and pre-contractual information, potentially leading to partial or total unenforceability. Faced with such uncertainty, lenders are incentivised to rely on purely domestic guarantees and domestic law structures.

This fragmentation reinforces the tendency towards national financing silos and undermines cross-border B2B lending. An optional European regime for B2B personal guarantees would enhance predictability while ensuring an appropriate and balanced level of guarantor protection.

Together, a European B2B loan contract and European B2B security contracts would form a coherent framework capable of facilitating secured cross-border financing and strengthening the integration of European corporate credit markets.

3.3.2 Securing investors in startups and scaleups through European B2B guarantees

45. Relevant and key provisions from the EBC Project (abstract). Under the EBC Project, European B2B sureties have been suggested in Book 5 whose main characteristics are the following:

1. Personal Eurosureties: The Code introduces the euroguarantee (an accessory guarantee where the guarantor is liable if the debtor defaults) and the independent personal euroguarantee (an autonomous guarantee, payable on demand, with very limited defenses for the guarantor). Both instruments are optional and require express party choice as well as minimal protection of the guarantor (consent may only been given in writing for the accessory euroguarantor).

2. European security interests in rem (Movables): The eurolien (pledge) and euro-retention of title can be created over any professional movable asset, with effectiveness ensured by registration in a European electronic register or by delivery. These securities can cover present or future obligations and are designed for flexibility and transparency.

3. Euromortgage (Immovables): The euromortgage is a non-possessory, accessory security over real estate, created by authentic deed and registered in both national and European registers. It is transferable with the secured claim and can be used to secure future or contingent obligations.

4. Key Features: All eurosureties are optional, harmonized, and designed for cross-border use. They promote legal certainty, transparency (public registers), and balanced protection for all parties, while allowing for contractual freedom and adaptation to business needs.

5. Contribution to Business Financing: These instruments provide a unified, flexible, and secure legal framework for credit and collateral across the EU, making it easier for companies to access financing, mobilize assets as collateral, and operate seamlessly in cross-border transactions.

By reducing legal fragmentation and increasing predictability, eurosureties foster a more integrated European financial market, supporting business growth and investment.

CHAPTER I: EUROGUARANTEES

Article 5.1.1.1 Definition A euroguarantee is an agreement under which the guarantor agrees to be liable to the creditor for the main debtor's debt if the main debtor defaults.

Article 5.1.1.2 Freedom of contract Unless otherwise provided for, the parties may derogate from the provisions of this Chapter. A euroguarantee is an optional instrument supplementing personal security interests under national law. It requires an express choice by the parties.

Article 5.1.1.3 Scope of application A euroguarantee may be obtained by a natural or legal person to guarantee one or more business debts of the main debtor.

TITLE TWO: EUROPEAN SECURITY INTERESTS IN REM

CHAPTER I: EUROPEAN SECURITY INTERESTS ON IMMOVABLE PROPERTY IN REM: EUROLIENS AND EURO-RETENTION OF TITLE
SECTION 1: GENERAL RULES

§ 1: Application

Article 5.2.1.1.1.1. Application
Any tangible movable property situated within the territory of a Member State of the European Union may be the subject of a eurolien or euro-retention of title. The grantor and beneficiary must be traders.

Article 5.2.1.1.1.2. Application by agreement of the parties
The parties must clearly express their choice to make their security subject to the eurolien or euro-retention of title scheme.

CHAPTER II: EUROMORTGAGES

Article 5.2.2. Euromortgages
A euromortgage is an optional instrument supplementing immovable security interests under national law. It requires an express choice by the parties. If the provisions of this Sub-title are silent, a euromortgage shall be governed by the law of the place where the immovable property is situated. Anyone may grant a euromortgage. The rules in this Sub-title are without prejudice to consumer protection provisions under national law.

SECTION 1 GENERAL PROVISIONS

Article 5.2.2.1.1. Definition

A euromortgage is a security interest in rem, which is accessory and contractual, whereby one or more immovable properties are used to secure one or more present or future obligations, while the grantor retains possession.

Article 5.2.2.1.2. Subject-matter
Any immovable property or right situated within the territory of a Member State of the European Union may be the subject of a euromortgage, regardless of the nationality of the parties and the law applicable to the secured obligation.

46. "Insolvency III"'s limited scope. A provisional agreement has recently been reached by the Council and the European Parliament on an EU Directive harmonizing certain aspects of insolvency law ("Insolvency III"). The purpose is to render the EU more attractive for investors. Currently, cross-border investors must take up to 27 different insolvency rules and proceedings into account when assessing investment opportunities and risks in states different from their own.

This agreement can be regarded as an important step towards a more efficient and truly integrated European capital market, which is of the essence of the EU's competitiveness.
However, only six items are taken into consideration:

- Avoidance actions
- Tracing assets
- Pre-pack proceedings
- Directors' duties
- Creditors' committee
- Transparency of national proceedings.

But alongside this, the laws governing real and personal guarantees are left in the hands of the national legislators. All these different rules do not allow an investor, a lender or a financial institution a simple and fair view of the true scope of the risk, with the consequence that the return on investment or cost of the credit cannot be determined properly, due to such complexity and uncertainty.

Regulation 2015/848 of 20 May 2015 relating to insolvency proceedings does not resolve the problems, as **it still refers to national laws to determine the scope of secured creditors' rights when confronted with the insolvency of a distressed debtor** (see Articles 8, 10 and 11 of this Regulation).
Similarly, Directive 2002/47 of 6 June 2002 (Directive Collateral), which left open a wide range of options, has not been implemented in a sufficiently harmonized manner in the Member States.

However, for the security, transparency and liquidity of financial markets, **predictability of the expected effects of guarantees on financial instruments or on receivables is crucial**. It should be addressed.

However, from a political standpoint, the ranking of secured creditors in an insolvency context remains a very **difficult issue** in light of the diversity of the interests involved (debtor, creditors, employees, etc.). It may thus be a very challenging topic for the European legislator.

3.4 European assignment of claims and European factoring (EBC Project)

3.4.1 Current obstacles

47. Business need and current legal issues. The assignment of claims is an important source of liquidity, particularly for SMEs. The assignment can be done, e.g., to a factor in the context of a factoring operation or to a bank as collateral for a loan. In Europe, assignments are governed by diverging rules of national private law. Yet which national law applies in this regard is highly uncertain. Therefore, **it is currently unknown which law applies to cross-border assignments in the Union**.

48. Assignment of claims and conflict of laws. If the *lex situs* is regarded as the connecting factor for proprietary rights in movables, as to claims the situation is less clear. Article 14 of the Rome I Regulation deals explicitly only with two legal relationships: the contractual relationship between assignor and assignee is submitted to the proper law of the assignment (Art. 14 (1)); the assignability and the relationship between assignee and *debitor cessus*/assigned debtor are both submitted to the law governing the right to which the assignment relates (Art. 14 (2)). What about the crucial relationship between the parties to the assignment and third parties, such as, for example, creditors of the assignee? For years, the EU has been discussing a regulation on the law applicable to third-party effects of assignments of claims, but the Commission proposal was effectively withdrawn in 2025 (Commission, Withdrawal of Commission Proposals, PUB/2025/833, OJ C, C/2025/5423, 6.10.2025). In the absence of any clear-cut rule, there are different solutions chosen by Member States courts (from party autonomy to application of Art. 14(2) of the Rome I Regulation, from the law of the place of the assigned debtor's residence or business, to the law of the assignor's place of residence or business).

Companies seeking to use their claims as collateral or for factoring are thus in an unenviable position, as they cannot determine with certainty which rules they must follow when assigning their claims. **It is unlikely that factors and lenders will accept the risks of a cross-border assignment without knowing which rules apply**. This situation creates unbearable legal uncertainty and puts a spanner in the works of the (re-)financing of companies and their provision with liquidity.

Companies need liquidity, and to obtain liquidity, they need collateral. The most important assets of most companies are their claims against customers. This is particularly true for small and medium-sized enterprises, especially start-ups, which barely have any other assets than their future cash flow.

Example 1: Company A manufactures highly customized and expensive machines, which it sells throughout the EU. For each machine produced, it needs considerable funds in advance. The only assets A has available are the claims against its international customers, which will become due only after the goods are delivered.

In a developed economy, future cash flow can be leveraged to finance present expenses and investments for improving future productivity. They can serve, for instance, as collateral for a loan, they can be sold on to a factor, or they can be securitized by a special purpose vehicle. A basic condition for any of these transactions is the existence of rules on the transfer of claims.

In the EU, such rules are lacking. Each Member State has different rules on the transfer and the pledge of claims. Worse, there is no uniform rule on how to identify which of these national rules applies to cross-border transactions. The absence of a uniform rule on the third-party effects of assignment leaves a gaping hole in the EU conflict-of-laws framework for assignments. Meanwhile, many Member States had already abolished their existing private international law rules on the subject in anticipation of a European regulation (an example is Germany, where the former Art. 33 of the Introductory Law to the Civil Code (EGBGB) governing the law applicable to assignments of a claim has been abolished as early as 2009).
As a result, there is considerable uncertainty as to how a claim is transferred or pledged inside the Internal Market. Banks, factors, and securitization vehicles cannot be sure that they have obtained the rights in claims they were promised. Consequently, they will either refuse transactions with companies in other Member States, or will accept them only under considerably more onerous terms.

Example 1 (continued): A wants to provide the claims against its international customers as collateral for a loan by bank B. Both parties must make sure that the claims are effectively transferred. However, it is unclear which law governs such a transfer: Is it the law of the creditor (A), the law of the various international debtors, or the law governing the claims? Since the lawyers are unable to clarify this question, B may refuse to grant the loan.

Example 2: C is a factor in Member State X. It is approached by company D, based in Member State Y, for funds in exchange for claims that D has against its customers. C cannot be sure whether it can obtain ownership (title) to the claims and under which law. It will therefore either reject the transaction or accept it only against a very high risk premium.

Example 3: S is engaged in the securitisation business. It runs a special purpose vehicle that purchases claims from start-ups in the EU and issues securities. Given the absence of uniform EU rules, S cannot be sure whether it actually receives title to the claims. As a result, it can sell its securities only at a steep discount. This will, in turn, vastly reduce the amount that S is willing to pay to the start-ups for their claims.
Please note that the EU's rules on securitisation (see, e.g., Regulation (EU) 2017/2402 of the European Parliament and of the Council of 12 December 2017 laying down a general framework for securitisation and creating a specific framework for simple, transparent and standardised securitisation, OJ L 347, 28.12.2017, p. 35) do not address these private law issues.

3.4.2 Refinancing start-ups and scale-ups with a European assignment of claims

49. Relevant provisions from the EBC Project (abstract). A simple solution to this problem is to adopt a 28th regime for cross-border assignments of claims. If the EU were to adopt uniform rules on the transfer and pledge of claims, the efficiency of the European capital market would be greatly enhanced. Such rules could be modelled on the European Business Code's Book 8 on Banking Law, which contains a special section titled 'European Assignment of Claims' (Art. 8.2.2.1.1.1 to 8.2.2.1.1.3 European Business Code). It provides a **handful of very clear and simple rules that cover all salient aspects of assignments**. In case it is chosen by the parties, this regime would supersede any national law. Where it is not, the existing Member State rules on assignment would remain untouched.

CHAPTER 2: FINANCING THROUGH MOBILISATION OF CLAIMS

SECTION 1: EUROPEAN ASSIGNMENT OF CLAIMS
§ 1: Definitions, scope of application, general principles
Article 8.2.2.1.1.1 – Concept
1. The European assignment of a claim is a contract by which a professional creditor assigns all or part of his claim against a professional debtor to a third party ("assignee").
2. The assignment may relate to one or more present or future claims, whether determined or determinable.
3. It may be made in return for payment or free of charge.
4. It extends to all accessories to the claim.

Article 8.2.2.1.2.2 - Transfer date
1. The transfer of the claim takes place between the parties and is enforceable against third parties from the date of the assignment contract.
2. In the event of a dispute, proof of the date of transfer lies with the assignee, who may provide it by any means.
3. In the case of successive assignments, the priority conflict is solved in favour of the first assignee in time, who has a right of recourse against the person to whom the debtor has paid.

3.4.3 Making factoring easier with a European B2B tool

50. European factoring. In addition, the European Business Code also contains a 28th regime for factoring contracts (Art. 8.2.2.2.1.1 to 8.2.2.2.2.2 European Business Code).

These provisions are modelled on the UNIDROIT Ottawa Convention on International Factoring but are considerably simpler since they are freed from certain redundancies. Extending this Convention as an optional regime to the entire Union would considerably facilitate cross-border factoring and thereby provide additional liquidity to enterprises in the EU.

SECTION 2: EUROPEAN FACTORING
§ 1: Definitions, scope of application, general principles

Article 8.2.2.2.1.1 – Concept
1. The European factoring contract is a contract by which one party, the supplier, transfers, by whatever means, to another party, the factor, claims arising in the course of its business activity.
2. The factor is to perform at least two of the following functions: – finance for the supplier; – maintenance of accounts relating to the claims; – collection of claims; – protection against default in payment by debtors.
Comment: Claims may be transferred to the factor notably via assignment or subrogation. The scope has been extended from claims arising out of the sale of goods to all claims arising in the course of a professional activity.
Article 8.2.2.2.1.2 – Selection
1. The European factoring regime only applies if the parties have chosen it. The choice must be express. It is not subject to any particular form.
2. The choice can be made at any time. The rights of third parties are not affected by a change of regime. 3. A partial choice of the European factoring regime is excluded.

Article 8.2.2.2.1.3 - Relationship with national law 1. The provisions of this section take precedence over all provisions of national law, including mandatory rules. 2. National rules of supervisory law, tax law and accounting remain applicable.

3.5 European Fiducia (Beyond EBC Project)

3.5.1 Current obstacles

51. Business need and current legal issues. Common law trusts are widely used for asset management and collateral, particularly in syndicated lending and securities holding

The absence of a trust-like instrument in many civil-law Member States creates competitive asymmetries and hinders cross-border structuring. The EU may suffer from a disadvantageous attractiveness since not all Member States recognize such transfers of ownership for a specific goal.

Fiducia is indeed an extremely valuable instrument for various business purposes, among other utilities for managing collateral, syndicated loans, assets or holding shares.
It would be a **civil law counterpart to the common law trust**. Its flexibility and amplitude are comparable with legal companies themselves since it is a "great contract", i.e. a contract that may pursue almost indefinite goals (even transferring assets to heirs outside of B2B relations).

3.5.2 Measuring the positive impact of a European B2B fiducia

52. Proposal. Euro fiducia has not yet been discussed in the EBC Project. However, a regulated European fiducia could be a fine alternative to the common law trust, offering flexibility and legal certainty for continental lawyers in a 28th regime competitive environment.
Euro fiducia would be particularly useful for securing financial assets and could be strictly supervised under the following characteristics:

- effective beneficiaries duly identified and registered on a relevant European registry.
- confined to B2B relations;
- assets segregated from trustees' estate;
- purposes including management and/or guarantee.

European legal systems remain **divided between trust-based and non-trust jurisdictions,** resulting in fragmented and uncertain cross-border use of asset-segregation mechanisms.

National trust-like instruments (French "fiducie", German "Treuhand", etc) differ significantly in structure, effects and insolvency treatment, limiting their effectiveness in the internal market. A European fiducia would provide a **uniform and neutral framework ensuring clear asset segregation and predictable effects** vis-à-vis creditors and insolvency estates.

It would facilitate secured financing, collateral management and structured transactions, particularly in cross-border B2B lending.

Such an instrument would be especially valuable for intercompany lending and non-bank finance, where ring-fencing assets is essential.

Conceived as an optional regime, a European B2B fiducia would enhance legal certainty without harmonising national property law. It would complement both European B2B loan and security contracts and support the objectives of the Capital Markets Union and the Savings and Investments Union.

It could be defined as such:

"*A Eurofiducia is an agreement by which one or more settlors transfer ownership of assets or a set of assets, present or future, to one or more trustees who, keeping them separate from their own assets, act for a specific purpose for the benefit of one or more beneficiaries.*
This purpose may, in particular, be management and/or guarantee"

Therefore, if not a priority, **the merits of the introduction of a European fiducia model should be discussed in more depth**.

3.6 Transfer of securities (EBC Project)

3.6.1 Current obstacles

53. Business need and current legal issues. Every common financial market faces the issue of the post-trade phase, i.e., the phase following the conclusion of contracts for financial instruments on an exchange or outside an exchange (over the counter - OTC).

At this point, the contractual obligations must be performed by the transfer of securities. This should be done in a timely and cost-efficient manner. The existence of different private law rules for the transfer of securities and other financial instruments can be an obstacle in this regard, since they render cross-border trading particularly cumbersome and expensive.
The United States has solved this issue by entrusting the post-trade phase to a single central operator, the Depository Trust and Clearing Corporation.
In Europe, the same function is fulfilled by **several central securities depositories (CSDs).** The latter apply their national laws to the management of the securities they hold for their clients, resulting in uncertainty about the applicable national law (see Commission Communication of 12 March 2018, COM(2018) 89 final). The existence of various CSDs creates inefficiencies.

Example 4: A is a company incorporated in the Czech Republic. If it wants to list on the Frankfurt Stock Exchange, it will have to deposit its shares with the German CSD Clearstream. If it wants to have a dual listing on the Paris Stock Exchange, it cannot use the shares deposited in Germany with the French CSD Euroclear, nor can it issue other shares for France. It needs to find a bank that is willing to take a deposit of shares in Germany and issue depository receipts over those shares to investors. These receipts can then be listed in Paris. This process is cumbersome and costly.

Example 5: X is an investor from the Czech Republic who wants to buy shares in company A that is listed on the Frankfurt Stock Exchange. It contacts its broker C, a Czech bank. The latter buys the shares on the Frankfurt Stock Exchange through a stockbroker. C needs to open an account with a German bank G that is a member of the German CSD Clearstream. The latter will credit the securities to the account of C, who in turn will credit them to X. However, X cannot obtain ownership of the shares but merely has a contractual right against C, who has a contractual right against G. This means that X bears two additional insolvency risks, namely that C or G becomes insolvent.

3.6.2 Introducing a European B2B transfer of securities

54. Relevant provisions from the EBC Project (abstract). It would be a great step forward if CSDs could manage their holdings according to uniform European rules, since this would avoid incompatibilities, facilitate cross-border transfers and guarantee the same rights for investors.

The European Business Codes contain such rules in Book 9 on Financial Markets. They cover registration, transfer, the rights of investors, a solution for cases where the number of securities held by the intermediary is insufficient to satisfy the investors' rights (so-called shortfall), and the creation of collateral rights over such securities (pledge).

These few and pithy articles have been suggested as rules for full harmonisation. However, at least in a first step, they could also be used as the kernel of a 28th regime for cross-border securities holdings and transfers.
The transfer of shares and bonds is included in Book 9 of CEA 5 (Art. 9.1.2.1.1 to Art. 9.1.2.1.5).

> *CHAPTER 2: EUROPEAN INSTRUMENTS*
>
> *SECTION 1: GENERAL RULES GOVERNING SECURITIES*
> *Article 9.1.2.1.1 - Registration European transferable securities are registered in an account held by an authorised intermediary or recorded on a distributed ledger. Comment: This provision follows the model of Article L213-2 of the French Monetary and Financial Code, with adjustments to reflect the European nature of the instrument. However, the scope of this section also includes securities traded on a regulated market or other trading venue (multilateral trading facility or organised trading facility).*
>
> *Article 9.1.2.1.2 - Transfer of securities*
> *3. Financial securities are transferred by book-entry or registration in a distributed ledger.*
> *4. The transfer of ownership of financial securities results from the registration of these securities in the purchaser's securities account or from the registration of these securities in a distributed ledger to the benefit of the purchaser.*
> *5. No one may claim for any reason whatsoever a financial security whose ownership has been acquired in good faith by the holder of the account in which these securities are registered or by the person identified via the distributed ledger.*

3.7 Dispute Resolution and Alternative Methods (EBC Project and beyond)

3.7.1 Current obstacles

55. Current legal issues. An efficient uniform legal framework needs efficient and uniform adjudication. Based on this insight, OHADA has created a common court in Abidjan, the Common Court of Justice and Arbitration (CCJA). The United States follows a different model. It has created a system of federal courts, in addition to state courts, which are based across the United States and decide questions of federal law and disputes involving parties from different states.

In contrast, the Court of Justice of the European Union (CJEU) has no decision-making powers of its own. It can interact with Member State courts only through the cumbersome procedure of preliminary references. Moreover, the CJEU has broad jurisdiction over all types of disputes. It does not specialise in civil or commercial matters, and its members are mostly experts in administrative matters. The same goes for the General Court of the EU.

3.7.2 Introducing specialized commercial courts within the CJEU

56. Proposals. Evolutions of the judicial system would be useful in light of a 28th regime and of an EBC.
To be fully effective, the 28th regime (and more generally the EBC Project) should receive a **uniform interpretation**. And the decisions applying this regime should also be **automatically enforceable** throughout the European Union without review by any national courts.

57. Special panel within national courts? Member States could consider introducing a special panel within their national courts dedicated to disputes between companies who have chosen the 28th regime.

Nonetheless, implementing such a formula would entail several **disadvantages**:

- the **rules governing conflicts of jurisdiction would not be eliminated**;

- English would be imposed as the most common language even though the relevant documents might not be written in that language and the parties may not have elected English to organize their cooperation and activities;

- national rules would apply with potentially important consequences for the determination of parties' respective rights, such as rules governing statutes of limitation, admissibility of evidence, manner in which evidence can be presented;

- the imperative period of time for rendering a decision, the conditions for recusal, the conditions for enforceability differ from one national court to another, as these questions would continue to depend on the general judicial law of each State;

- in addition, national judges and legislators have different approaches and are used to different practices of conciliation and mediation.

Such an option would therefore create **unpredictability, judicial fragmentation** and discomfort for the parties with an unavoidable risk of **forum shopping** and inconsistent solutions to similar problems across the European Union.

58. Specialised chamber within the CJUE; truly European court. It is precisely such drawbacks that the establishment of a truly European system aims to avoid

Another more ambitious option would therefore to establish a **specialised chamber within the CJEU** that focuses on commercial matters as suggested in Book 1 of the EBC Project (article 7.3.2).

It remains a feasible matter from an institution standpoint.

Articles 19.1, 19.3 a) and 257 of the TFUE provide for an existing legal basis for the creation of such a Specialized Court, with the possibility of a full appeal before the Tribunal and an appeal limited to legal points before the General Court of the European Union.

A truly European court, multilingual and multicultural, composed of experts in the application and interpretation of the 28th regime, would indeed foster trust, efficiency, uniformity and security.

It should be a dedicated and specialized European judicial or arbitral tribunal with exclusive competence to (i) interpret the scope and sense of the rules provided by the 28th regime (or the EBC); (ii) consistently and transparently use the same methods of interpretation (contextual or teleological); (iii) examine the facts by applying identical rules on burden of proof, admissibility of means of evidence, determination of their respective probative value; (iv) issue interim and provisional measures, if necessary; (v) render enforceable decisions that would be recognized and respected in each of the Member States without any review or formality; (vi) order a prior attempt at mediation or invite the parties to resort to another method of dispute resolution, in appropriate cases, such as arbitration.

CCJA's role on OHADA's uniform interpretation (see n°32) may in this respect serve as a useful **reference**.

Such a Court would be a **game changer** for the EU's single market completeness. Indeed, it would represent: (i) a **safe harbor** for EU business actors engaged in transnational disputes; (ii) an attractive institution of choice for non-EU business actors operating within and outside the EU; (iii) a powerful gravitational **pull for adopting the European regime or Code (instead of English or Swiss law)**.

3.7.3 Introducing provisions on B2B Alternative Dispute Resolution

59. Mediation and arbitration. Arbitration and other alternative methods of dispute resolution (mediation) could be introduced at the European level (Titre VII, EBC Book 1).
A European arbitration and ADR system would provide predictable and harmonized dispute-resolution mechanisms for cross-border cases.

It would most probably **reduce costs and delays** compared with national court litigation, making the optional regime even more **attractive** and self-autonomous from a business standpoint.
Such a system would enhance the EU's legal competitiveness and strengthen the effectiveness and credibility of any future EU-level optional legal regime.

Arbitral tribunals could be given the possibility to ask preliminary questions to the CJEU in order to prevent them from undermining the uniform interpretation of EU law.

Article 7.1.1. Definition
1. Mediation is a process by which two or more parties attempt to resolve their dispute amicably with the help of one or more mediators chosen by them.
2. In the course of any proceeding, the judge or arbitral tribunal may at any time, on the basis of the request of the parties or on its own initiative after obtaining their agreement, appoint one or more mediators.

Article 7.1.2 Qualifications of the mediator
1. The mediator shall be neutral, impartial and independent.
2. He is bound by an obligation of confidentiality.

Article 7.2.1. Right to compromise (arbitration)
1. *All professionals can compromise the rights that are freely available to them.*

2. *If the arbitration is based on an arbitration clause, this clause must have been accepted by the party against whom it is sought, unless that party has succeeded to the rights and obligations of the party who initially accepted it.*

3. *The arbitration clause is independent of the contract that contains it.*

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