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CCBE Contribution on the European Commission's upcoming proposal on the 28th Regime in Company Law

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Introduction

The Council of Bars and Law Societies of Europe (CCBE) represents the bars and law societies of 46 countries and, through them, more than 1 million European lawyers.

The CCBE has consistently supported the development of an optional 28th company law regime as an instrument capable of improving the functioning of the Single Market and facilitating cross-border establishment of companies in the EU. At the same time, the orientation of the forthcoming proposal toward very low or even zero capital requirements create an unavoidable structural challenge: once capital no longer performs its traditional protective function for creditors, the legal framework must fill that gap with a coherent and substitutive system of safeguards. Without such mechanisms, the flexibility offered by the new regime would be offset by increased exposure for creditors and greater reliance on personal guarantees. These consequences would not only undermine the credibility of the new form, but could also weaken the principle of limited liability, which remains a cornerstone of European company law.

Experience across Member States shows that any reduction or abolition of minimum capital has always been accompanied by a broader set of compensatory safeguards. For the purpose of this contribution, the CCBE does not suggest reproducing or merging these national systems. Rather, we consider that the common principles that emerge from them offer valuable guidance for shaping an appropriate safeguard architecture for the 28th regime. To assist the Commission's work, the CCBE therefore presents examples from several jurisdictions-not as templates to be copied, but as practical illustrations of mechanisms that have proved effective in maintaining creditor confidence and ensuring responsible corporate behaviour where capital requirements have been lowered or removed.

Member State Practice

Austria provides a clear and instructive example. With the introduction of the Flexible Capital Company (FlexCo), the legislature reduced the minimum capital to a mid-range level but deliberately avoided a purely symbolic capital model. This was supplemented by the comprehensive application of the Austrian capital-maintenance regime, as the rules of Section 82 GmbHG-read together with Section 1(2) FlexKapGG-protect not only the subscribed capital, but the entire company assets, thereby ensuring that unlawful value transfers to shareholders can be reversed and that directors remain accountable for any breach of solvency or liquidity obligations. Austrian law also places particular emphasis on director liability when financial deterioration is not adequately addressed, and on clawback mechanisms where distributions infringe capital-maintenance rules. Because these safeguards already extend beyond mere protection of nominal capital, it is generally considered that there is no need to introduce an additional "existence-destroying liability" for FlexCo shareholders. All these elements show that even with a reduced capital threshold, the combination of strong governance duties and a robust asset-protection regime continues to play a central role in maintaining the credibility and reliability of the company form.

Belgium offers a different approach to replacing capital protection. With the reform of its private company form (BV/SRL), the legislature abolished the legal notion of capital entirely but replaced it with a set of targeted mechanisms designed to ensure that the company has adequate financial substance. The most important of these is the mandatory financial plan, that founders must prepare at incorporation, demonstrating that the company's initial equity and financing-whether through contributions, shareholder loans or bank funding-are sufficient for the company to carry out its envisaged activities for at least the first two years. This plan is not publicly disclosed, but it can be examined by an insolvency trustee, and founders may incur liability for uncovered debts if the plan shows clearly inadequate funding at the time of formation. Beyond formation, Belgium also protects creditors through a double-distribution test. Any value transfer to shareholders requires both a net-assets test, ensuring that the company's net assets remain positive after the distribution, and a liquidity test, requiring the governing body to assess whether the company will be able to meet its debts for at least the next twelve months. Directors are liable for authorising distributions in breach of these tests, and shareholders must return distributions that violate them. This reform in Belgium's law shows that even in the absence of legal capital, creditor protection can be maintained through well-designed requirements on financial adequacy, responsible governance and enforceable restrictions on value transfers, offering a relevant example of how safeguards can operate in a low-capital environment.

Finland provides another example of how creditor protection can be maintained without relying on minimum capital. Since July 2019, private limited companies no longer require any share capital, a reform introduced on the recognition that small nominal capital does not in practice safeguard creditors. Instead, Finnish law places primary emphasis on the responsibility of the board of directors to monitor the company's equity and solvency on a continuous basis. Where the company's equity becomes negative, the board must immediately register the loss of equity in the trade register, and failure to comply may expose directors to damages liability towards creditors, provided the general conditions for liability are met, including causation. Distributions are also subject to strict statutory limitations: assets may not be distributed if the company is insolvent or if the distribution would render it insolvent, and any distribution must be based on the latest approved financial statements, taking into account all significant developments since their preparation. If the company is required to appoint an auditor, the financial statements must be audited before a distribution can be made. Shareholders must return assets received in breach of these rules, and directors may be liable if they authorise a distribution contrary to law. Finnish practice shows that a combination of continuous equity monitoring, insolvency-based distribution prohibitions and enforceable director and shareholder liability can effectively replace traditional capital-maintenance requirements.

France illustrates how a highly flexible company form can operate with almost no capital while still maintaining certain creditor-protection mechanisms. Since 2008, the minimum capital requirement for the Société par Actions Simplifiée (SAS) has been abolished, so that an SAS can be incorporated with as little as EUR 1. This, together with the very flexible governance arrangements permitted by law, has made the SAS the most widely used company form in France, especially for entrepreneurs, start-ups and small and medium-sized businesses. The primary guarantee for creditors is therefore no longer the nominal amount of capital, but the company's assets and, where necessary, contractual safeguards that creditors themselves negotiate. In this context, French law relies on a combination of measures. First, there is an obligation to constitute a legal reserve by allocating at least 5% of annual profits until that reserve reaches 10% of the share capital, a mechanism whose effectiveness is limited where the initial capital is very low. Second, dividends may not be distributed if the distribution would reduce the company's equity below the sum of the share capital and non-distributable reserves. Third, creditors may bring a delictual liability action against founders or shareholders in cases of undercapitalisation or misuse of the company structure, where this has made it impossible for the company to operate normally or has caused them specific harm; success in such actions depends on proving a fault, personal damage and a causal link. The French experience shows that when capital is reduced to a symbolic level, creditor protection is reshaped around a combination of reserve-building, distribution restrictions and targeted liability, with the practical burden of risk assessment increasingly resting on creditors themselves.

German law also provides for the possibility of establishing a limited liability company without minimum share capital in the form of the "Unternehmergesellschaft haftungsbeschränkt" (UG). This has proven very popular in practice, without detracting from the appeal of the GmbH, which can only be established with a minimum share capital of EUR 25,000. With the exception of the provisions on minimum share capital, the legal form of the UG is very similar to that of the GmbH. After its formation, the shareholders must transfer an amount equal to one quarter of the net income for the year, reduced by any loss carryforward from the previous year, to a statutory reserve. This statutory reserve may only be used for purposes specified in the law and, in particular, may not be paid out to the shareholders. This gives the shareholders the opportunity to "save up" a minimum share capital of EUR 25,000. The obligation to transfer funds to the reserve ceases as soon as the company has share capital equal to the statutory minimum capital of a GmbH, i.e., EUR 25,000. This is accompanied by further instruments for creditor protection, which also apply to the GmbH, such as liability for actions that destroy the company's existence, the subordination of shareholder loans in insolvency proceedings, or the liability of managing directors for payments that lead to the company's insolvency.

Ireland demonstrates how creditor protection can be ensured through a substantive governance and capital-maintenance framework rather than through high capital levels. In Irish private companies limited by shares (Ltd.), any return of value to shareholders is tightly controlled. Distributions may only be made from profits available for distribution and must be supported by the relevant financial statements, while directors must be satisfied that the company will remain able to meet its debts as they fall due. Irish law also imposes detailed restrictions on transactions benefiting directors or connected persons, including loans, guarantees and financial assistance, as well as substantial non-cash asset transfers. These restrictions may only be relaxed through the Summary Approval Procedure (SAP), which requires a directors' declaration of solvency-question of personal liability if made without reasonable grounds-and approval by a special resolution of the shareholders. This framework, complemented by strong enforcement tools for creditors in situations of insolvency or misconduct, shows that effective creditor protection can be achieved through rigorous distribution controls, oversight of insider transactions and director accountability, even in a system with low minimum capital.

Poland’s Simple Joint-Stock Company (PSA) illustrates a model in which creditor protection is no longer based on statutory share capital, but on a structured set of substantive safeguards. The PSA operates without a minimum-capital requirement, and the protective function traditionally associated with capital maintenance is carried out through a series of complementary mechanisms. The central element is a solvency test, under which the management board may authorise a distribution only if the company is able to meet its liabilities at the time of the decision and, on a forward-looking assessment covering the following year, is not at risk of insolvency. This is reinforced by a balance-sheet test that prevents distributions which would reduce the company’s net assets below the sum of its functional “share capital” (reflecting the actual value of contributions) and the mandatory reserve capital. In addition, the PSA must allocate 8% of annual profits to reserve capital until this reserve reaches at least 5% of total liabilities, thereby ensuring a financial buffer to compensate for the absence of statutory capital. These substantive rules are supported by a strict liability regime: members of the management board may be liable to the company and to creditors for distributions made in breach of the statutory tests, and may also incur liability for the company’s debts if they fail to file for bankruptcy on time. Shareholders, by contrast, are only required to return unlawful distributions and are not otherwise exposed to personal liability, in line with the objective of maintaining the attractiveness of the form. The PSA thus demonstrates that an effective creditor-protection framework can be constructed without statutory capital, provided it is based on coherent solvency controls, reserve-building obligations and enforceable management accountability.

Slovakia provides another illustration of how creditor protection can be maintained where minimum capital is merely symbolic. The simple joint-stock company (*jednoduchá spoločnosť na akcie*, “j.s.a.”), introduced in 2017 and targeted at start-ups and venture capital, may be incorporated with registered capital of only EUR 1, which must be fully subscribed and paid before registration. As such capital offers no substantive financial buffer, the protective function is carried out through a combination of rigorous formation controls and substantive safeguards during the company’s life cycle. Incorporation requires notarial involvement or notarised signatures, judicial scrutiny by the registry court, and AML and beneficial-ownership checks. Transparency is ensured through publicly accessible registers of corporate data and financial statements. Once established, the j.s.a. must create a non-distributable reserve fund and may make distributions only if, after the distribution, its equity remains at least equal to the registered capital and mandatory reserves; shareholders must return unlawful distributions, and members of the statutory body may incur liability for authorising them. Given the low level of capitalisation, many j.s.a. companies rely on shareholder loans, and Slovak law applies “company in crisis” rules that restrict repayment of such funding when the company is near insolvency, with repayments made in breach of these rules subject to restitution. Directors are subject to a duty of due managerial care and may incur civil or, in serious cases, criminal liability for approving unlawful distributions, continuing business despite statutory insolvency indicators, or failing to file for insolvency in time. The Slovak model therefore demonstrates that, where capital is symbolic, creditor protection must rest on ex-ante control, balance-sheet-based restrictions on distributions, limits on shareholder financing in distress situations, and strong director duties supported by transparency mechanisms.

Spain represents a final example of how Member States have addressed the challenges posed by symbolic capital through a structured set of compensatory safeguards. Following a 2022 reform of the Capital Companies Law, a private limited liability company may now be formed with capital of one euro, replacing the previous threshold of EUR 3,000. To compensate for this minimal capitalisation, the law requires that 20% of the company’s annual profit be allocated to a legal reserve until the combined amount of capital and reserve reaches EUR 3,000. This measure ensures the gradual accumulation of a financial buffer capable of absorbing early losses. In addition, if the company enters voluntary or involuntary liquidation and its net assets prove insufficient to meet outstanding obligations, the shareholders become jointly and severally liable for the shortfall between EUR 3,000 and the subscribed capital. Spain’s model therefore confirms that, where capital is purely symbolic, the legal framework must rely on a combination of mandatory reserve-building and defined residual shareholder liability to maintain creditor protection in the formative years of the company.

General Comments

Beyond these safeguards mentioned above, we would like to highlight the need for transparent and reliable information in cross-border situations. In particular, where a company established under the 28th regime opens a branch in another Member State, it is essential that registers contain accurate and up-to-date information on the branch’s activities, the persons authorised to represent it, and an address for service of legal proceedings. This information may be maintained in the home-state register or the host-state register, provided the relevant Member

State has fully implemented BRIS, thereby ensuring effective cross-border access. Transparency is indispensable for market participants who must be able to assess counterparty risk with confidence.

Another issue emerging from the comparative analysis concerns investor agreements. If the European Commission envisages proposing standard form clauses, it should consider the divergence that currently exists in national judicial practice. In some Member States, Courts apply doctrines that restrict contractual freedom, particularly where minority shareholders may be disadvantaged. Without clear guidance or meta-rules accompanying standard clauses, inconsistent judicial interpretation could undermine their value. Ensuring that Courts give effect to contractual allocations of rights and obligations would therefore be necessary to preserve legal certainty.

What emerges from these national experiences is a shared understanding that the protective function traditionally performed by capital cannot be removed without a corresponding legal architecture that fulfils the same purpose. As legal practitioners across different Member States, we observe that no jurisdiction that has reduced or abolished capital requirements has relied on a single safeguard. In every instance, legislators have adopted a composite framework of measures designed to preserve creditor confidence and ensure financial discipline within the company. Although the specific mechanisms vary, each system relies on a combination of solvency-based controls, mandatory reserve-building, restrictions on value transfers, clawback of unlawful distributions, director liability, enhanced transparency requirements and early-warning duties in the vicinity of insolvency.

Conclusion

For the 28th regime to function effectively, it must be supported by a coherent system of safeguards comparable to those developed in the Member States. A framework built on solvency and net-asset preservation, supported by reserve-building where capital is minimal, enforceable duties on directors, clear rules on distributions and related-party transactions, predictable clawback mechanisms and robust transparency requirements would allow the new company form to remain flexible without weakening creditor confidence or creating legal uncertainty in the Single Market.

As legal practitioners engaged daily in company formation, governance and restructuring across the European Union, the CCBE and its members are uniquely positioned to support the European

Commission in shaping and implementing this new framework. Lawyers play a central role in ensuring transparency, legal certainty and compliance throughout the life cycle of companies, acting as trusted intermediaries who help to secure the correct and consistent application of the 28th regime in practice. Drawing on this practical experience, the CCBE stands ready to contribute to the development and effective operation of the new regime so that it functions reliably across the Union and remains firmly anchored in the core principles of European company law.