

The Scope of the 28th Regime

A legal framework for innovation the
European way



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Abstract

This in-depth analysis, commissioned by the European Parliament's Policy Department for Justice, Civil Liberties and Institutional Affairs at the request of the Committee on Legal Affairs, examines the scope of the proposed 28th regime. For the 28th regime to be successful, it needs to be user-friendly and widely adopted, thereby fostering trust and investment. Restricting access to 'innovative companies' could create bureaucratic obstacles that would discourage entrepreneurs and investors. Rather than restricting access, the 28th regime should be open to businesses of all kinds and designed to meet the needs of innovative businesses, including those with an exit strategy who wish to attract venture capital funding and those with a vision of long-term independence. Broad access to most parts of the 28th regime - especially in the area of company law - should be combined with targeted measures to a modular approach.

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LIST OF ABBREVIATIONS

CJEU	Court of Justice of the European Union
EJTN	European Judicial Training Network
ERC	European Research Council
ESOP	Employee Stock Ownership Plan
EU	European Union
FlexCo	Flexible Company
IKE	Private Equity Company
IMF	International Monetary Fund
JURI	Committee on Legal Affairs
LLC	Limited Liability Company
PSA	Simple Joint Stock Company
R&D	Research and Development
SE	Societas Europaea
SMEs	Small and Medium Enterprises
SPE	Societas Privata Europaea
SUP	Societas Unius Personae
TFEU	Treaty on the Functioning of the European Union
US	United States
VC	Venture Capital

EXECUTIVE SUMMARY

Background

Europe urgently needs to improve its competitiveness and economic independence to secure its prosperity, security and commitment to values such as human rights, equal opportunities and necessary sustainable transformation. To achieve this goal, Europe must encourage and support its innovative companies to fulfil their potential and grow across European borders. The Letta and Draghi Reports have identified legal fragmentation and lack of investments as crucial obstacles for European innovative companies. The so called 28th regime is a crucial building block in addressing these challenges. This study explores how the scope of the 28th regime can be designed to support its important objectives.

The report submits that the 28th regime must be easy to adopt to support innovation and growth. Choosing **a narrow approach** that limits access to “innovative companies” would require not only developing appropriate definitions for such companies but also administrative institutions checking compliance with these requirements. Finding such definitions would not only be difficult but enforcing them would entail bureaucratic hurdles that could discourage rather than support innovative entrepreneurs and investors (see Chapter 2).

To help close the European innovation gap, the focus should be on the **needs of innovative businesses rather than on defining innovative businesses** (Chapter 3). However, a completely open, **horizontal approach** implemented in one legislative act would **not be targeted enough**. Therefore, a **modular approach** is preferable that **complements measures open to all companies with targeted measures** that offer support or prevent circumvention of important rules such as tax law, labour law, or creditor protection (Chapter 4).

While Europe should learn as much as possible from the innovation of US and China, it should find a European way to innovation. The diversity of European companies should be seen as an asset in increasing competitiveness and economic independence. Therefore, the 28th regime should focus on the needs of different founders and entrepreneurs, **supporting exit-oriented businesses with venture capital investments as well as long-term oriented businesses** (Chapter 6.1). The ability to design articles of association and shareholder agreements freely is crucial for both (Chapter 6.2). A supranational corporate form or harmonised national company law should allow this as well as access to qualified courts that decide cases quickly ensuring a uniform application of the law across Europe (Chapter 5.3). The study suggests not only using traditional legislative measures, but also innovative legal tools (Chapter 5.4), as for example **standardised shareholder agreements and articles of association** of high quality to bring down costs for investors and entrepreneurs and ease the adoption of the 28th regime (Chapter 5.2). To support innovative businesses with long-term orientation, the study explores innovative **finance, shares with multiple voting rights, veto-shares** (Chapter 6.3), and other elements of **steward ownership such as asset locks** (Chapter 6.4).

Recommendations

The study makes the following recommendations:

- The **focus should be on the needs of innovative businesses rather than on defining them**. Therefore, when defining the **scope** of the 28th regime, the EU should adopt a **modular approach**:

- In principle, the 28th regime should be **open to all businesses** that wish to opt-in.
- Such open regulation should be **complemented by more targeted measures** in additional legislative instruments, offering special support to certain groups of innovative companies and preventing the circumvention of important legal rules, such as tax and laws protecting workers and creditors.
- When adopting this **modular approach, ease of use** and **preventing fragmentation** are of the utmost importance in order to encourage widespread adoption of the 28th regime and thereby establish standards, foster trust and encourage investment across Europe.
- A European **supranational limited company or harmonised company law**, introduced as part of the 28th regime, **must allow entrepreneurs and investors to design articles of association and shareholder agreements that meet their needs.**
- The **uniform application of the law relating to the 28th regime** should be ensured by making qualified national or European courts or judges who conduct hearings in English responsible for such cases.
- **Traditional legislative measures**, such as regulations and directives, should be combined with innovative tools. The latter could be discussed within a dedicated forum of the JURI Committee. These innovative tools should be developed from a holistic perspective, taking into account the practical needs and legal effects, particularly in relation to tax law, of the Member States.
- As an innovative tool, the EU should offer standardised, fair and high-quality **shareholder agreements and articles of association** designed by legal experts, experts from venture capital funds and entrepreneurs, and already adjusted to the harmonised laws of the Member States. This would enable investors to reduce costs and ensure consistent outcomes across all EU Member States.
- Legislation and innovative tools should **not only focus on the innovation of exit-oriented startups. Innovation should be embraced the European way.** The innovative potential of exit-oriented start-ups and long-term businesses whose founders wish to retain control should be acknowledged. Furthermore, independent businesses are strategically important and can strengthen Europe's security and independence.
- Independent, innovative businesses can be supported by offering options such as **multiple voting rights, veto shares, revenue-based finance instruments** and **steward ownership elements.**

1. INTRODUCTION

KEY FINDINGS

The project of the so-called 28th regime was formally introduced by President Ursula von der Leyen in her Political Guidelines for the 2024–2029 Commission, in response to Europe's urgent **need for innovation and competitiveness**. These statements built on the analysis presented in the Letta and Draghi Reports, which had already suggested introducing a 28th regime as a legal framework comprising company, labour, insolvency and tax law. The project aims to address the need for growth and competitiveness while preserving European values such as social inclusion, democracy and sustainability. Innovative companies could opt into the 28th regime to avoid problems arising from legal fragmentation between Member States (1.1).

Three approaches could be taken with regard to the scope of the 28th regime: **a narrow approach**, which limits access to innovative companies; **a horizontal approach**, which opens access to all companies that find it useful; and **a modular approach**, which combines a horizontal approach with other legislative acts limited in scope to certain companies (1.2)

Under a narrow or modular approach, certain businesses would be excluded from the 28th regime. However, the study argues that this unequal treatment could be justified (1.3).

This Chapter briefly reflects the background of the discussion of a 28th regime (1.1) and then outlines three possible approaches for the scope of the 28th regime (1.2). It then discusses the relationship between scope and equal treatment (1.3).

1.1. Innovative companies the European way

The formal discussion on a so-called 28th regime formally started with President Ursula von der Leyen's Political Guidelines for the 2024–2029 Commission.¹ In her political guidelines and again in her address at the World Economic Forum in Davos, she underlined the importance of developing **European competitiveness and growth** and stated the goal to offer “innovative companies to operate all across our Union under one single set of rules. We call it the 28th regime. Corporate law, insolvency, labour law, taxation – one single and simple framework across our Union. This will help bring down the most common barriers to scaling up all across Europe.”²

This policy initiative was supported by the so called “**Letta Report**” and “**Draghi Report**”. The Letta Report proposed a European Business Code providing a 28th regime that particularly SMEs could opt

¹ *Ursula von der Leyen, Europe's Choice: Political Guidelines for the next European Commission 2024–2029, Strasbourg 18 July 2024, p. 7.*

² *Ursula von der Leyen, Special Address by President von der Leyen at the World Economic Forum, Jan 21 2025, https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_25_285*

into like choosing the legal system of a virtual 28th Member State.³ The Draghi Report also recommended a 28th regime including the legal statute of an „Innovative European Company“.⁴

Both reports stress the importance of improving **access of European businesses to (venture) capital** to enable innovative companies to **scale up** quickly.⁵ President von der Leyen, the Letta and Draghi Reports also highlight the importance of **Europe’s independence** in times of uncertainty, **social inclusion, democracy and sustainability**.⁶ Von der Leyen speaks of “a new plan for Europe’s sustainable⁷ prosperity and competitiveness.”⁸ The Letta Report states that the Single Market required a genuine social dimension that ensures social justice and cohesion. “A strong social dimension in the Single Market promotes inclusive prosperity, ensuring fair opportunities, workers’ rights and social protection, while contributing to growth.”⁹ The Draghi Report submits that “[w]hile Europe should aim to match the US in terms of innovation, it should aim to exceed the US in providing opportunities for education and adult learning and good jobs for all throughout their lifetimes.”¹⁰ Thus in times of global uncertainty, it is not the goal to become like Europe’s global competitors, but to build a more innovative, competitive economy on the basis of European values for the benefit of European people. Consequently, the 28th regime should not just aim at copying strategies from the US and China, but **growing innovative companies the European way**.

1.2. Three possible approaches

The scope of the 28th regime is of great significance for increasing European competitiveness and growth by supporting innovative businesses to grow within the European Union.

There are three possible approaches to the 28th regime:

- A **narrow approach**, according to which the 28th regime would only be open to certain businesses.

³ *Enrico Letta*, Much More Than A Market – Speed, Security, Solidarity, Empowering the Single Market to deliver a sustainable future and Prosperity for all EU Citizens, April 2024, p. 107-109.

⁴ *Mario Draghi*, The future of European competitiveness – A Competitiveness strategy for Europe, 2024, p. 29.

⁵ *Enrico Letta*, Much More Than A Market – Speed, Security, Solidarity, Empowering the Single Market to deliver a sustainable future and Prosperity for all EU Citizens, April 2024, p. 26-38; *Mario Draghi*, The future of European competitiveness – A Competitiveness strategy for Europe, 2024, p. 27-28; see also European Central Bank, Occasional Paper Series, Capital Markets Union – A deep dive (2024); see also Stefano Miccosi, Andrea Stringhetti, Tackling Impediments to Capital Markets in the EU IEP@BU Policy Brief (2024) p. 6-7.

⁶ *Ursula von der Leyen*, Europe’s Choice: Political Guidelines for the next European Commission 2024-2029, Strasbourg 18 July 2024, p. 18-24. On the need for a Capital Union see also: European Central Bank, Occasional Paper Series, Capital Markets Union – A deep dive (2024).

⁷ *Mario Draghi*, The future of European competitiveness – A Competitiveness strategy for Europe (2024) p. 1, 3, 35.

⁸ *Ursula von der Leyen*, Europe’s Choice: Political Guidelines for the next European Commission 2024-2029, Strasbourg 18 July 2024, p. 6; see for a new vision of European prosperity: *Marija Bartl*, Reimagining Prosperity (2024).

⁹ *Enrico Letta*, Much More Than A Market – Speed, Security, Solidarity, Empowering the Single Market to deliver a sustainable future and Prosperity for all EU Citizens (2024) p. 92.

¹⁰ *Mario Draghi*, The future of European competitiveness – A Competitiveness strategy for Europe (2024) p. 2, 15; see also *Mario Draghi*, The future of European competitiveness – B In-depth analysis and recommendations (2024) p. 246.

- A **horizontal approach**, according to which the 28th regime would be open to any business that wishes to use it.
- A **modular approach**, according to which certain parts of the 28th regime would be open to all businesses and other parts open only to certain businesses.

The scope of the 28th regime depends on the topics to be regulated. Since this question is still under development, this discussion is preliminary.

1.3. Scope and equal treatment

Under a narrow or a modular approach, certain businesses would be excluded from using some or all of the tools offered under the 28th regime. Depending on the advantages this might offer, and the criteria used, such exclusion might be perceived as unequal treatment¹¹ by other businesses, entrepreneurs and investors. Equal treatment of all persons under the law by the institutions of the EU¹² including legal persons¹³ is protected as a general principle¹⁴ under the CJEU case-law enshrined in Article 20 (1) CFEU.¹⁵ Compliance with the principle of equal treatment requires that **comparable situations must not be treated differently, and that different situations must not be treated in the same way unless such treatment is objectively justified**.¹⁶ According to settled case-law, differences in treatment are justified if they relate to a legally permitted objective pursued by the measure having the effect of giving rise to such a difference and is proportionate to that objective.¹⁷

Unless special grounds apply that make the differentiation particularly severe, the CJEU acknowledges that the legislator has wide discretion balancing political, economic and social considerations. In such cases, the control of the CJEU is limited to obvious mistakes.¹⁸ The Court has also acknowledged that

¹¹ The principle equal treatment is protected by special guarantees in the law of the European Union and has been accepted as a general principle at least since CJEU decision of 19.10.1977 – C 117/76, 16/77 Slg. 1977, 1753, para 7 *Albert Ruckdeschel & Co. and Hansa Lagerhaus Ströh & Co. v. Hauptzollamt Hamburg-St. Annen*; *Diamalt AG v. Hauptzollamt Itzehoe*.

¹² Article 51 (1) CFEU.

¹³ *Hans Jarass*, EU-Grundrechte Charta 4. Edn (2021) Article 51 para. 54.

¹⁴ CJEU decision of 12.11.2014 – C-580/12 P *Guardian Industries und Guardian Europe/Kommission*, EU:C:2014:2363, para 51; CJEU decision of 4.5.2016 – C-477/14, *Pillbox 38*, EU:C:2016:324, para 35; CJEU decision of 7.3.2017 – C-390/15, *Rzecznik Praw Obywatelskich (RPO)* para 42.

¹⁵ CJEU decision of 14.9.2010 – 550/07 – *Akzo Nobel Chemicals Ltd* – paras. 54–55; CJEU decision of 22.5.2014 – C-356/12, *Wolfgang Glatzel v. Freistaat Bayern*, para 43; *Jarass Charta der Grundrechte 4th edn 2021 Article 20 para 2,4*; see for the development of the principle *Elise Muir*, *The Essence of the Fundamental Right to Equal Treatment: Back to the Origins*, *German Law Journal* (2019) 20, pp. 817, 820-822.

¹⁶ CJEU decision of 19.10.1977 – C 117/76, 16/77 Slg. 1977, 1753, *Ruchdeschel v. Hauptzollamt St. Annen* para 7.

¹⁷ CJEU decision of 16.12.2008 – C-127/07 *Arcelor Atlantique et Lorraine ua*„ para 46; CJEU decision of 17.10.2013 – C-101/12, *Schaible*, para 77; CJEU decision of 22.5.2014, *Glatzel*, C-356/12, para 43; CJEU decision of 7.3.2017 – C-390/15, *Rzecznik Praw Obywatelskich (RPO)* para 53.

¹⁸ See in relation to the tax treatment of e-books and digital newspapers: CJEU decision of 7.3.2017 – C-390/15, *Rzecznik Praw Obywatelskich (RPO)* para 54.

simple, easy to apply rules for business can be a legitimate goal.¹⁹ Moreover, distinctions need to be appropriate and the least restrictive of the appropriate measures available.²⁰

A focus on innovative businesses could be justified with the **legitimate goal of boosting European's competitiveness and growth** as explained in the Letta and Draghi Report. While it seems unsure that EU legislation on innovative businesses could be based on Article 173 or 179 (1) TFEU, as these Articles do not clearly include a basis for legislative measures,²¹ they might offer supporting arguments to introduce legislation aimed at facilitating the growth of innovative businesses. However, depending on the tools offered and advantages the 28th regime may bring for businesses, businesses could argue that the criteria excluding them were either not appropriate or not providing the least restrictive measure available. This question needs to be revisited when the content of the 28th regime becomes clearer. However, simplification in the interest of easy applicability and practicality should be unproblematic. After all, easy to apply rules for business can be a legitimate goal for differential treatment.²²

Nevertheless, while the exclusion of certain businesses from the scope of the 28th regime might be justified, such exclusion might cause political discussion.

¹⁹ CJEU decision of 7.3.2017 – C-390/15, *Rzecznik Praw Obywatelskich* (RPO) para 58-60.

²⁰ CJEU decision of 7.3.2017 – C-390/15, *Rzecznik Praw Obywatelskich* (RPO) para 61, 64.

²¹ Matthias Ruffert in Callies and Ruffert (eds) *EUV-AEUV Kommentar*, 6th edn. (2022) Art 173 para 28, 29.

²² CJEU decision of 7.3.2017 – C-390/15, *Rzecznik Praw Obywatelskich* (RPO) para 58-60.

2. NARROW APPROACH

KEY FINDINGS

Taking a **narrow approach** that limits access to 'innovative companies' would require the development of appropriate definitions for such companies, as well as the establishment of administrative institutions to check compliance with these requirements. For the 28th regime to be successful, it needs to be as easy to adopt and use as possible. Only then can it create new standards and foster trust among entrepreneurs and investors. **Bureaucracy is a serious problem**, particularly for SMEs, which both the Draghi and Letta reports aim to address. **If the 28th regime required checking whether a business was innovative, it could be perceived as creating even more red tape** rather than helping innovative companies.

A legislative approach offering access to the 28th regime only to start-ups – young, innovative businesses with growth potential – would require defining growth potential. This would necessitate time and skills not commonly found in a registry or public administration, and thus resources for expert opinions. Moreover, innovativeness would also need to be defined, which is a challenging task, as experience in the Member States demonstrates (2.1).

According to the **Draghi Report**, innovative start-ups should 'qualify based on criteria such as the qualifications of their workforce, R&D expenditure, and ownership of intellectual property rights'. However, such a definition could create bureaucratic burdens that might discourage entrepreneurs from using the 28th regime. Entrepreneurs would need to provide proof of their R&D expenditure and intellectual property rights, as well as evidence of their workforce's qualifications, which would have to be checked by a national or European institution, requiring additional resources. Furthermore, the impact of any subsequent changes to the company's workforce or R&D expenditure would need to be addressed (2.2).

Corporate form (2.3), investment structure (2.4) and field of business activity (2.5) are also rejected as useful criteria, as checking them would create bureaucratic hurdles and exclude innovative businesses that adopt different approaches. Focusing on companies in specific fields, such as AI, risks applying outdated concepts of innovation.

Legislative competence may require a **cross-border dimension**. However, requiring a company to provide evidence of the potential European scope of its business idea in order to demonstrate its innovativeness would necessitate considerable expertise and an administrative process to verify compliance. Both would require resources and could be perceived as bureaucratic hurdles (2.6).

This chapter discusses several possible criteria according to which the scope of the 28th regime could be limited, paying particular attention to possible negative effects of such criteria. It discusses possible criteria for 'innovative companies' such as startups (2.1.), the criteria suggested in the Draghi Report

(2.2.), corporate forms (2.3.), investment strategies, in particular venture capital investment (2.4.), specific fields such as AI or biotech (2.5.) and a potential European scope of a business idea (2.6.).

2.1. Startups, growth-potential and innovation

The scope of the 28th regime could be limited to startups. Startups are usually defined as innovative companies with growth potential that have been founded 5 to 10 years ago;²³ Deep-tech-startups develop technological solutions and products based on scientific findings and technological innovations for which they hold their own patents. To achieve this, they undertake considerable R&D for which they need to raise high risk capital.²⁴ These are the innovative businesses the Draghi Report suggests supporting to close the innovation gap to the US and China.

A legislative approach offering access to the 28th regime only to startups would not only need to define **growth-potential**, which would require time and skills not commonly found in a registry or public administration or resources for expert opinions. Such investment would only make sense when businesses are supported with public funding. Moreover, **innovativeness** would have to be defined. There are definitions and approaches to measure innovation, e.g. in the Oslo Manual of the OECD.²⁵ However, a definition of innovation as offered by such documents is not helpful for defining the scope of the 28th regime. Innovation is the result, the product of an innovative company. However, defining innovation as such is not helpful for identifying organisations that are likely to achieve it in the future. Rather, a definition is needed that allows identifying business organisations that are likely to develop innovative products or services in the future and make them successful on a global scale. The Draghi-Report has suggested such an approach and will be discussed under (3.2).

The **difficulty of defining startups** is also reflected by the **experience of the Member States**. Some Member States have reformed company law for startups. However, while the Austrian FlexCo²⁶ and the Polish PSA²⁷ are designed for startups, they are open to all founders wishing to use them. The Greek private company IKE was not even designed for startups but for SMEs.²⁸ In Germany, company forms limited to special fields such as shipping, mining or insurance are losing ground.²⁹ In the US, normal

²³ Startup Strategie der deutschen Bundesregierung BTDrucks 20/3036 p. 1; Austrian Startup Monitor (2024) p. 4.

²⁴ Austrian Startup Monitor (2024), p. 4; *Enrico Letta*, Much More Than A Market – Speed, Security, Solidarity, Empowering the Single Market to deliver a sustainable future and Prosperity for all EU Citizens, (2024) p. 32.

²⁵ *An innovation is a new or improved product or process (or combination thereof) that differs significantly from the unit's previous products or processes and that has been made available to potential users (product) or brought into use by the unit (process)*. OECD, Oslo Manual 2018 – Guidelines for Collecting, Reporting and Using Data on Innovation (2018) p. 20.

²⁶ *Friedrich Rüdfler*, Flexible Kapitalgesellschaft und GmbH-Novelle in Susanne Kalss und Ulrich Torggler (ed) Reform des Gesellschaftsrechts, 2022, 113-128; *Holger Fleischer/Matthias Pendl*, Flexible Kapitalgesellschaft (FlexKapG) in Holger Fleischer (ed) Rechtsformneuschöpfungen im in- und ausländischen Gesellschaftsrecht (2024) p.699, 721-722.

²⁷ *Adam Opalski, Krzysztof Oplustil, Tomasz Sójka, Anne-Marie Weber*, The Simple Joint Stock Company: Emergence of a New Close Company in Poland, ECFR (2024) 604, 610.

²⁸ *Lazaros Grigoriadis*, Report from Greece: A New Business Entity in Greek Company Law: The Private Company (PC), ECL 2013, 213-215; *Nikolaos Vervessos*, Private Kapitalgesellschaft (Idiotiki Kefalaiouchiki Etairia, IKE) in in Holger Fleischer (ed) Rechtsformneuschöpfungen im in- und ausländischen Gesellschaftsrecht (2024) p. 539, 547.

²⁹ *Holger Fleischer/Matthias Pendl*, Flexible Kapitalgesellschaft (FlexKapG) in Holger Fleischer (ed) Rechtsformneuschöpfungen im in- und ausländischen Gesellschaftsrecht (2024) p.699, 721-722.

limited liability companies and corporations are used for startups, there are no special legal forms for them.³⁰ The Italian experience is particularly interesting: following the 2012 “Restart Italia!” Report,³¹ special advantages were offered to “innovative startups”. However, especially because of the difficulty defining them, these advantages were opened to all SMEs in 2017 and are today practically accessible to all s.r.l.³²

Drafting the 28th regime with a scope limiting access to innovative companies could still be useful if this would justify a competence for EU-legislation. However, Article 173, 179(1) TFEU might offer supporting arguments for such a regulation but not necessarily a competence basis for legislative measures.³³

Letting it suffice that a **company considers itself as a startup** would avoid bureaucratic burdens. It would also make sense as innovativeness is a quality that most new businesses claim for themselves. If founders were not convinced that they had identified a gap in the market they could fill better than their competitors, they would not start their business. However, such a subjective approach would not limit access meaningfully to a 28th regime.

Limiting the scope to **newly founded businesses** would also be problematic. Bringing proof that the business was not founded more than ten years ago would again erect bureaucratic hurdles and any time-limit would be somehow arbitrary. After all, there is a specific need for supporting scale-ups and it is difficult for a legislator to decide when an innovation has taken too long. Only the market can do that.

2.2. The Draghi Report

According to the Draghi Report, innovative startups should „qualify based on criteria such as the qualifications of their workforce, R&D expenditure, and ownership of intellectual property rights. For instance, defining innovative companies based on the criteria already put forward in the EU competition acquis (including at least 10% total operating costs devoted to R&D), would make the new statute accessible for at least 180,000 innovative SMEs (including startups) and innovative mid-caps (including small mid-caps) in the EU.”³⁴ This proposal has the advantage of being applicable across fields and being open to businesses of all sizes. This definition targets the organisational basis for disruptive innovation, not innovation as such.

However, such a definition risks erecting bureaucratic burdens **that could discourage entrepreneurs from using the 28th regime**. Entrepreneurs would need to bring proof for their expenditures for **R&D, intellectual property rights and the qualifications of their workforce**. The last criterion in particular would erect bureaucratic hurdles since bringing evidence for the qualifications of a workforce is not

³⁰ *Gregg Polsky*, Explaining Choice of Entity Decisions by Silicon Valley Startups, 70 *Hastings L.J.* (2019) p. 409, 411.

³¹ Restart Italia, Rapporto della Task Force sulle startup istituita dal Ministro della Sviluppo Economico (2012) <https://www.mimit.gov.it/images/stories/documenti/rapporto-startup-2012.pdf>.

³² *Paolo Giudici and Peter Astner*, Startups and Company Law: The Competitive Pressure of Delaware on Italy (and Europe?) *EBOR* (2019) 20 (3) p. 597, 617.

³³ *Matthias Ruffert* in Callies and Ruffert (eds) *EUV-AEUV Kommentar* (6th edn. 2022), Article 173 para 28, 29.

³⁴ *Mario Draghi*, The future of European competitiveness – B In-depth analysis and recommendations (2024) p. 254.

always easy, especially for a business with an international workforce.³⁵ Businesses across Europe already struggle with the recognition of their international workers' credentials. Bureaucracy is a serious problem especially for SMEs that both the Draghi and Letta reports want to ease.

Choosing and **using the 28th regime should be as easy as possible** for businesses. The 28th regime will only be successful if it is easy to adopt and beneficial to use for entrepreneurs and investors.³⁶ Only then, it can create new standards and trust among entrepreneurs and investors. Since legal advisors will not have any experience with the 28th regime at least at first, they will hesitate to recommend it and might charge more for advising on it, at least at first. Moreover, a 28th regime, however carefully designed, is likely to leave questions open that national law has had decades and centuries to answer.³⁷ This might also make advisors hesitate to recommend the 28th regime. Investors may also be cautious to adopt established model documents to a new regime. A requirement to bring evidence for an innovative character could discourage founders even more to try something new.

Moreover, such requirements are **usually not met at the time of the establishment of the business** but only later. While such an approach might be appropriate for scaleups, it would not fit newly established startups. If the 28th regime offered a separate, uniform legal regime including rules on company law, labour law, insolvency and tax law that need to be opted into, **businesses should adopt it as early as possible**. Entrepreneurs want to concentrate on developing their business and engage with legal questions as little as possible because they require time and money for legal advice. Therefore, a legal form is chosen early at the time of funding when shareholder agreements between founders and investors are drawn up. All this is changed later only if there are considerable benefits. Changing into a 28th regime that could affect not only a corporate form and shareholder relationships but also employment contracts and – with applicable insolvency law – also the relationship with creditors such as banks would have massive implications for a company that is already up and running. While such difficulties depend on the actual design of a 28th regime, they should be kept in mind already when defining the scope.

Finally, if adopting the 28th regime required proof of the above criteria, it would be important to determine whether these requirements must be met **throughout the life of the company** or only at the founding stage. If the former was the case, should a business be required to change status after having lost its innovative character as defined by the 28th regime, for example when the composition of the workforce changed, or investment into R&D decreased? To keep track of such developments, proof of the ongoing innovativeness of the business could be required in regular intervals. This is probably not an appealing scenario for entrepreneurs deciding whether to adopt a new regime or stick with tools their advisors and investors know. **If choosing and or keeping the 28th regime required proof of the**

³⁵ The IMF Working Paper – Lifting Binding Constraints on Growth in Europe (2025) p. 9 argues that difficulties in achieving recognition for personal qualifications could discourage European workers from working across European borders.

³⁶ The European Central Bank has discussed in its paper Capital Markets Union – A deep dive (2024) p. 41 how projects like EuVECA Regulation and the European Social Entrepreneurship Fund may have seen only moderate success because of additional requirements.

³⁷ IMF Working Paper – Lifting Binding Constraints on Growth in Europe (2025) p. 13.

business's innovative character, it could appear as erecting even more red tape rather than helping innovating companies.³⁸

2.3. Corporate form and alternative forms of business ownership

If a supranational corporate form or a directive with a targeted harmonisation of company law was introduced as the main part of the 28th regime, access to other benefits offered by the 28th regime could be limited to businesses that have adopted the legal form of the 28th regime. After all, the goal of a 28th regime is to offer a harmonised legal framework specifically designed for innovative businesses.

However, defining the 28th regime by referring to a certain form of company could have disadvantages. There is considerable **potential of businesses organised in alternative ownership structures**, including partnerships, cooperatives, social enterprises, associations and other nonprofits carrying business activity,³⁹ enterprise foundations⁴⁰ and other steward owned businesses.⁴¹ Indeed, OpenAI was at least at first structured as a non-profit controlling a capped profit company, in which Microsoft also invested.⁴² In Denmark, enterprise foundations – foundations owning companies – have a long history of long-term oriented business ownership.⁴³ Such enterprise foundations control some of the most valuable companies in Europe, e.g. the pharmaceutical company Novo Nordisk.⁴⁴ A 28th regime linked to the legal form of a limited company would exclude access for some of these businesses, though others, like enterprise foundations, may use the limited company under the 28th regime as a subsidiary.

In light of the diversity of corporate forms in Europe, it might be discussed if certain instruments unrelated to company law, e.g. labour law, could be extended to businesses in other national legal forms such as partnerships, associations or cooperatives. However, while this is theoretically possible, it might be complicated and seems unnecessary to avoid legal problems of unequal treatment.

In relation to the legal basis of a **European Cross Border Association**, the Council has submitted that nonprofits not distributing profits were not protected by the freedom of establishments.⁴⁵ This might support the view that excluding these entities from the scope of the 28th regime is appropriate. It is not the place here to discuss this question fully. However, even if this view is taken, it must be acknowledged that most social enterprises and foundation owned businesses do distribute at least

³⁸ Overregulation and bureaucracy is discussed as a serious problem for SMEs for example in Germany see Sarah Necker, *Abkehr von Überregulierung und Bürokratie dringend geboten*, ifo Schnelldienst (2025) p.46; Sina Allgeier, *Nachhaltigkeit und Mittelstand* (2024) p. 421 et seq.

³⁹ *Antonio Fici*, *A statute for European cross-border associations and non-profit-organizations* (2021).

⁴⁰ For an overview: *Marja Bartl, Rutger Claassen, Nena van der Horst* (eds) *Whitepaper Sustainable by Design* (2024).

⁴¹ For more details see 6.4.

⁴² <https://openai.com/our-structure/>

⁴³ See *Anne Sanders and Steen Thomsen*, *Enterprise Foundation Law in Comparative Perspective* (2023); *Steen Thomsen, and Nikolaos Kavadis*, *Enterprise Foundations. Law, Taxation, Governance, and Performance*, *Annals of Corporate Governance* (2022) p. 227–333.

⁴⁴ <https://www.novonordisk.com/>

⁴⁵ <https://data.consilium.europa.eu/doc/document/ST-5125-2025-INIT/en/pdf>

some of their profits. Steward owned businesses⁴⁶ may not distribute profits to shareholders with voting rights but aim for profitable business activity and distribute profits to investors. Moreover, these businesses require investments and can thus benefit from the free movement of capital.

Nevertheless, it is **unlikely that the CJEU would consider it problematic that businesses unwilling to adopt the limited liability company introduced by the 28th regime would be excluded from other benefits the 28th regime might offer.** To be useful, the 28th regime must be functional and easy to use and cannot be too complicated. The CJEU has acknowledged that simple, easy to apply rules for business can be a legitimate goal for differential treatment.⁴⁷ Offering different tools with different access could become highly complicated. Nevertheless, given the potential of alternative business forms, the 28th regime should take their needs into account, as will be discussed further under Chapter 6.3 and 6.4.

2.4. Financial structures and investment strategies

Many fast-growing companies are financed by venture capital funds and encouraging investors to fund European startups beyond an early stage is an important goal of the 28th regime. Nevertheless, **excluding companies with a specific structure of investors or specific investment strategies would not work.**

First, such an approach would again erect bureaucratic burdens. In particular, founders and investors may hesitate to disclose their investment structure and even more so the names of involved funds and investors.

Second, focussing on certain investment structures may discourage innovative investment tools, investments strategies and ownership structures that could offer options to improve long-term orientation. Rather, the European approach should be open for all kinds of investors and different investment strategies.

Third, an investment-oriented approach would risk excluding more unusual investors or investment strategies because European legislators may be unaware of recent trends. For example, startups do not only work with a goal of maximising profits but also to create social or environmental impact. Such companies perfectly match the idea of innovation the European way that looks at a long-term perspective and pursue social and ecological impact. They have potential to create important innovations with high growth potential both for profits and society.⁴⁸ Therefore, the German Federal Government included such businesses in its 2022 startup strategy.⁴⁹ Sweden is number 4 in venture capital investments, number 3 in deep tech and number 2 in impact investing in Europe. 74% of the Euro 4,7 bn of investments in Swedish startups went to impact startups/came from impact investors. Moreover, in the important field of late-stage venture capital investment 96% was raised in Sweden in

⁴⁶ See under 6.4.

⁴⁷ CJEU decision of 7.3.2017 – C-390/15, Rzecznik Praw Obywatelskich (RPO) para 59–60.

⁴⁸ *Ashoka, McKinsey*, Wenn aus klein systemisch wird – das Milliardenpotenzial sozialer Innovationen (2019).

⁴⁹ Startup-Strategie der Bundesregierung, BT-Drucksache 20/3063 p.12–13.

2023 by impact startups.⁵⁰ It follows that a 28th regime should not only take into account traditional investments but also include impact investment and other forms as well to boost growth and competitiveness in a European way.

2.5. Specific fields

The Letta Report specifically mentions AI, Biotech, Biorobotics, healthcare and Quantum-Computing⁵¹ as fields where innovation is currently happening. Though Europe had probably lost the competition in some technological fields, it could still catch up in these other areas, the Draghi Report argues.⁵² Given this analysis, it seems at a first glance a good idea to focus the 28th regime specifically on companies that are active in fields that could bring Europe forwards. Such an approach could also be targeted and measures tailor-made for the needs of businesses in these specific fields.

Nevertheless, the 28th regime should **not be limited to specific fields**. Though innovation is happening in the fields of AI, healthcare and deep tech at the moment, fields of innovation are always shifting.⁵³ Given the time needed for developing and implementing European legislation, it seems likely that fields of innovation move on, even before legislation is fully adopted. Later changes may also be difficult. Criteria identifying innovativeness by field risk applying concepts of innovation that might soon be outdated. Identifying the most promising fields of innovative activities should be left to innovators, possibly in close contact with researchers at universities.

Even if innovative fields could be defined in regularly updated lists to complete legislation, civil servants may not have the skills to detect current developments. Involving external experts would be costly.

It is possible to design **specific measures** involving for example financial support for research projects within the European Research Council or startups targeted to promising fields of innovation. However, the 28th regime as discussed here mainly offers a legal framework for innovative businesses. These frameworks do not need to be so targeted but would benefit from widespread adoption.

Moreover, even if defining fields of innovation would be possible, checking whether a business is indeed active in such an innovative field would **again erect bureaucratic hurdles** and require personal and technical resources in European or the Member States' administrations.

2.6. (Potential) European scope of the business idea?

It would be possible to limit access to a 28th regime to business ideas with a (potential) Europewide scope. This suggestion was made in a discussion in the JURI committee of May 13 2025. There are indeed two dimensions to this proposal.

First, a **cross-border dimension** might be necessary to **justify legislative competence** under e.g. Art. 50 and 114 TFEU. In respect to previous proposals for supranational legal forms including the Cross

⁵⁰ Sweden Tech Report (2023) p. 28, 30.

⁵¹ *Enrico Letta*, Much More Than A Market – Speed, Security, Solidarity, Empowering the Single Market to deliver a sustainable future and prosperity for all EU Citizens, April 2024, p. 7.

⁵² *Mario Draghi*, The future of European competitiveness – A Competitiveness strategy for Europe, 2024, p. 20.

⁵³ *Mario Draghi*, The future of European competitiveness – A Competitiveness strategy for Europe, 2024, p. 24.

Border Association, Societas Unius Personae (SUP) and Societas Europaea (SE), this topic has been addressed.⁵⁴ The topic of legislative competence will be discussed in another report and is thus not the focus of this report.

Second, the **potential European scope of a business idea** might be used **as a tool to define innovativeness**. It could be argued that a business idea that has the potential to make a company a disruptor and develop into a world leader necessarily has the potential of being pursued all over Europe. More locally oriented firms such as the local baker or butcher were not in need of the 28th regime. However, to follow this approach, the potential of a business idea would have to be evaluated by experts, because a young company is usually only active in one member state. Thus, expert opinions would be necessary to evaluate the business idea. Again, such experts are difficult to find in public administration and might be expensive if they were willing to work in public administration rather than for investors. Such expert opinions would therefore require considerable resources, paperwork and slow down the process. Moreover, if the 28th regime would offer advantages, e.g. in the area of tax law, regional SMEs might feel discriminated against. While such an argument might not be legally justified, it might make the process politically more difficult.

⁵⁴ See on the discussion with respect to proposals for a simplified European Company: *Iris Barsan, A simplified European Company – A Comparative and Prospective Approach*, Actes du Colloque, RTDF (2023) No. 4 p. 10, 12-15.

3. A HORIZONTAL APPROACH

KEY FINDINGS

Granting all companies that find it useful access to the 28th regime (horizontal approach, 3.1) has **considerable advantages**: Firstly, it avoids the need for complicated definitions and **saves** companies, Member States and the EU **resources** that would otherwise be spent checking compliance. Secondly, if the 28th regime can easily be opted into, **it can be widely used, thereby creating trust** among investors and companies. International investors and legal advisers will be reluctant to use or recommend an unknown new tool in any case. Any entry requirements would increase transaction costs and further discourage investors and founders from using the 28th regime (3.2).

However, a horizontal approach might **not be targeted enough** to address specific challenges or offer support to specific businesses (3.3).

Chapter 2 has shown the difficulties of a narrow approach that targets innovative companies and excludes other, non innovative companies. Therefore, a horizontal approach could be more promising. After defining it (3.1.), the chapter will discuss advantages (3.2.) and possible disadvantages of such an approach (3.3.).

3.1. Defining a horizontal approach

A horizontal approach could be pursued in two ways:

- First, the legal framework could be **open to all businesses** that consider it useful for their own goals and needs.

This first approach would require no bureaucracy at all. Choosing such an approach might be regarded as losing connection to the idea of the Draghi and Letta Reports.

- Second, the legal framework could require **a statement by founders that they pursue an innovative business idea.**

The second approach might link the whole project to the overall goal of targeting innovative companies. Still, it would be a horizontal approach since no objective proof for the subjective ideas of the entrepreneurs were asked for. However, such statements might again be perceived as needless bureaucracy and thus be criticised. Moreover, they might discourage businesses that do not understand that such a requirement would be just a formality. Therefore, the following discussion will focus on the first approach.

3.2. Advantages

A horizontal approach could have considerable advantages in making the 28th regime successful:

- First, a broad approach **avoids bureaucratic hurdles** that could discourage investors and entrepreneurs.
- Second, an **opt-in instrument**, such as the 28th regime, **must be easily accessible in order to be used at all**. The more businesses use it, the more investors and legal advisors will become familiar with a 28th regime and ready to use and suggest it.
- Third, if widely used, such an **instrument can set new standards** for investors and founders across and even beyond Europe, creating trust and increasing the willingness to invest. An obscure instrument investors and legal advisors do not know is unlikely to create trust in European investments and close Europe's innovation gap.
- Fourth, broad access avoids unequal treatment of other SMEs which may decrease **acceptance of the 28th regime**, even if it could be legally justified.

3.3. Possible disadvantages and innovation through innovative tools

If all companies were free to opt into the 28th regime, the question would arise as to whether a regime with such a wide scope could still support innovation in Europe. Instead, it could be seen as an attempt at overall harmonisation.

However, it is submitted that the political goal of supporting innovative companies could still be achieved adopting a horizontal approach. Rather than focussing on erecting hurdles to keep out non-innovative companies, the focus should be on designing legal tools and measures **for the specific needs of innovative companies**. An approach focussing on the needs of innovative businesses rather than on defining innovative businesses should be adopted.

Still, such an approach **might not be targeted enough** to offer support where it is needed most or address specific challenges. While certain tools such as a corporate form are successful if adopted by as many businesses as possible, a more targeted approach might be necessary, as discussed next.

4. A MODULAR APPROACH

KEY FINDINGS

Adopting a **modular approach** would mean that the 28th regime would not be enacted through a single legislative act, but rather through **a number of different acts and possibly additional innovative tools**. This would allow targeted measures with a narrow approach to be combined with opt-in legislation open to all companies ready to use it.

Legislation using a broad, horizontal approach could ensure widespread usage and establish standards that investors and innovators can rely on. Such legislation is especially useful when businesses have a choice of different options, as in company law. Therefore, a special corporate form for innovative businesses should be accessible to all interested founders and investors.

More targeted legislation could provide **additional support** for certain innovative businesses **or address the risks** of the 28th regime more effectively. According to President Ursula von der Leyen, the 28th regime should address not only company law, but also labour law, tax law, and insolvency law. However, harmonisation in all these areas, particularly tax law, is highly controversial due to the different standards and approaches in the Member States, as well as the need to prevent the circumvention of protective rules. Targeted legislation could introduce solutions to such risks and reduce understandable reservations towards the 28th regime (4.1).

However, it is crucially important to **avoid fragmentation** when adopting this approach. The most important goal in the operation of the 28th regime should always be ease of application. Only a useful and user-friendly tool will convince entrepreneurs, legal advisers and investors, and thus help Europe to close the innovation gap (4.2).

This Chapter discusses a modular approach with its opportunities and risks (4.2). A modular approach **combines horizontal access to certain instruments with narrow access to other instruments** for a more targeted strategy (4.1).

4.1. When a targeted and when a narrow approach?

A horizontal approach should be chosen for situations where businesses should have a choice. Thus, the 28th regime could offer tools designed to be particularly useful for innovative businesses, but **open to all**, especially in **company law**, such as a legal form (more about this under Chapter 5). Such tools could be open for all businesses willing to adopt them, thereby ensuring wide usage with the potential to establish standards investors and innovators can rely on.

However, according to the statements of President Ursula von der Leyen, the 28th regime should also include tools concerning labour law, tax law and insolvency law.⁵⁵ Harmonisation in all these areas, in

⁵⁵ See on the importance of insolvency law as barrier to capital flow: *Stefano Miccosi, Andrea Stringhetti, Tackling Impediments to Capital Markets in the EU IEP@BU Policy Brief (2024) p. 5-6.*

particular tax law, is highly controversial as there is a need to avoid circumvention of protective rules. Targeted measures could allow focussed solutions to such risks and understandable reservations towards a 28th regime. Such targeted measures could either give certain innovative businesses **extra support** or **deal with risks of the 28th regime in a targeted way**.

- First, if certain financial or legal **advantages** should be provided **to certain innovative businesses**, for example in relation to tax law, labour law and insolvency law, or financial support, it is likely that such benefits should not be open to all. At this point, it is unclear what kind of advantages might be appropriate, but in case the European legislator wishes to consider such measures, a targeted approach seems necessary.
- Second, a targeted approach might also be used to **avoid circumvention** of national or European tax law, insolvency law or labour law by companies opting into the 28th regime. For example, companies doing business and hiring employees in one member state could be required to follow local national co-determination rules even if they use a legal form of the 28th regime and are incorporated in another Member State.

The question where and how a targeted approach could be desirable depends on the final goals of a 28th regime. In this respect, there is great uncertainty yet, so that the discussion must remain rather abstract.

This modular approach could be pursued combining **a number of well-coordinated legislative measures rather than one big legislative instrument**.⁵⁶ However, this would mean that the 28th regime would not just be enacted in one big step, but in a process combining different legislative acts and other measures over a longer period of time.

4.2. Possible disadvantages

As a possible **disadvantage**, a modular approach entails the same problems of finding useful definitions and avoid discrimination as highlighted above. If certain innovative businesses should, for example, receive financial support, these innovative businesses would have to be defined. This, as was shown already, is no easy task. Nevertheless, since measures with specific goals were pursued in this case, appropriate criteria could be defined in a more targeted way and should also be easier to test.

A second disadvantage is a **risk of fragmentation** that must be avoided as much as possible to avoid confusion and make the 28th regime as easy to use as possible. Legal fragmentation is a serious challenge for European businesses and believed to be a barrier for productivity.⁵⁷ The 28th regime should be a means of reducing this fragmentation for innovative businesses. If entrepreneurs and legal advisors have to study complicated rules and their interaction on the European and national level, the appeal of the 28th regime could be lost in complication.

⁵⁶ See for such an approach *European Central Bank, Occasional Paper Series, Capital Markets Union – A deep dive* (2024) p.42.

⁵⁷ *IMF Working Paper – Lifting Binding Constraints on Growth in Europe* (2025) p. 5-6; see also *Stefano Miccosi, Andrea Stringhetti, Tackling Impediments to Capital Markets in the EU IEP@BU Policy Brief* (2024) p. 2-5.

5. TOOLS FOR ALL INNOVATIVE BUSINESSES

KEY FINDINGS

To help close the European innovation gap, the **needs of innovative businesses** should be analysed and the best ways to support them. A supranational company law form could offer a unified legal framework, thereby reducing complexity in cross-border activities of firms. However, given the limited success of previous projects and the difficulties in reaching the unanimity required by Article 352 TFEU, a more promising approach might be to aim for a **targeted update of national company laws**. A directive aiming at selective harmonization of different legal forms in the Member States could still bring important improvements for businesses. However, in this case, it is especially **important to ensure easy use and standardisation to reduce transaction costs** in the interest of international founders and investors (5.1)

The 28th regime should be open for the needs of different founders and entrepreneurs, **supporting exit-oriented venture capital investments as well as options for long-term orientation (see Chapter 6)**. The ability to design articles of association and shareholder agreements freely is crucial for both.

The study suggests not only using traditional legislative measures, but also innovative legal tools, as for example **standardised shareholder agreements and articles of association** of high quality to bring down costs for investors and entrepreneurs and ease the adoption of the 28th regime. In this respect, Europe can learn from standardised documents offered in the US and Germany (5.2).

Moreover, the study suggests making **specialised courts or judges** responsible for cases concerning the 28th regime to ensure a uniform application of the law and efficient hearings conducted in English. The EU could build on the commercial courts that have been introduced in some Member States as an attractive alternative to regular courts (5.3).

The study suggests **using different measures** and tools and a **smart mix** combining them. Traditional legislation might be necessary to meet some needs, but other, more **innovative tools** should be considered as well, such as the proposal of standardised documents suggested above or the following proposals concerning long-term orientation. Innovative measures can complement regulation and thereby enhancing positive effects. Innovative tools must be approached in a holistic way, keeping in mind not only the interaction with European but also national law, especially tax law. **Discussing and designing such innovative tools might require a European forum** to do so (5.4).

The 28th regime should offer tools designed to be particularly useful for innovative companies. As many of these tools as possible should be open to all businesses willing to use them. This chapter and the next chapter suggest a couple of such tools, particularly in company law.

The legal framework and tools offered in the 28th regime should be designed to address the challenges holding back European businesses. According to the Letta and Draghi Report, but also the IMF Working paper and European Central Bank, **lack of capital**⁵⁸ and **legal fragmentation**⁵⁹ are serious challenges, slowing down the opportunities of businesses to scale up across borders. Since overall harmonisation is unlikely to be achieved soon, the 28th regime was proposed as a way for innovative businesses to opt into a uniform legal framework including company law, labour law, insolvency and tax law.

While a new corporate form designed for the needs of innovative businesses could be useful, such a goal might be difficult to achieve (5.1.). Therefore, this report also sketches a proposal for standardised documents that could be useful as well as easy to implement (5.2), especially when combined with a new European company form or a targeted update of national company law. The Chapter concludes with recommendations that encourage to think beyond traditional legal measures, to provide the greatest possible support for European innovative businesses (5.3.).

5.1. A new corporate form for innovative businesses or an update of national company laws?

A supranational company law form could offer a unified legal framework, thereby reducing complexity in cross-border activities of firms. Over the last decades, there have been a number of reforms on closed limited company forms in different Member States, such as the Polish Simple Joint Stock Company (*Prosta spółka akcyjna, PSA*)⁶⁰ and the Austrian FlexCo.⁶¹ At the same time, there have been different proposals for a European closed limited company. Unfortunately, both the *Societas Privata Europaea (SPE)* as well as the *Societas Unius Personae (SUP)* have not been successful.⁶² A new attempt could be made now for a private limited company especially designed for the needs of

⁵⁸ European Central Bank, Occasional Paper Series, Capital Markets Union – A deep dive (2024); see also Stefano Miccosi, Andrea Stringhetti, Tackling Impediments to Capital Markets in the EU IEP@BU Policy Brief (2024) p. 6-7.

⁵⁹ IMF Working Paper – Lifting Binding Constraints on Growth in Europe (2025) p. 6, 13-14.

⁶⁰ See Adam Opalski, Krzysztof Oplustil, Tomasz Sójka, Anne-Marie Weber, The Simple Joint Stock Company: Emergence of a New Close Company in Poland, ECFR (2024) p. 604-635.

⁶¹ See Holger Fleischer/Matthias Pendl, Flexible Kapitalgesellschaft (FlexKapG) in Holger Fleischer (ed) Rechtsformneuschöpfungen im in- und ausländischen Gesellschaftsrecht (2024) p.699-730.

⁶² European Commission, Proposal on the Statute for a European private company, Brussels, 25 July 2008 COM(2008) 396 final 2008/0130 (CNS); Christoph Teichmann and Peter Hommelhoff, *Societas Privata Europaea (SPE)* – General Report, in: Heribert Hirte and Christoph Teichmann (eds), *The European Private Company – Societas Privata Europaea (SPE)* (2013) p. 1-32; European Commission, Proposal for a Directive on single-member private limited liability companies, Brussels, 9 April 2014 COM(2014) 212 final 2014/0120 (COD).

Christoph Teichmann and Andreas Fröhlich, *Societas Unius Personae (SUP)* – Facilitating Cross-Border Establishment, *Maastricht Journal of European and Comparative Law* 2014, 536; See for later proposals: Association Henri Capitant, *Projet de code européen des affaires, Avant-projet relatif à la Société Européenne Simplifiée (SES)*, 15 December 2020, Haut Comité Juridique de la Place Financière de Paris, *Rapport sur la société européenne simplifiée* (2021) <https://www.henricapitant.org/actions/code-europeen-des-affaires-avant-projet-relatif-a-la-societe-europeenne-simplifiee/>

innovative businesses according to the principles sketched in Chapter 6. For startup and scaleups searching for international investors, having one legal form with a name signalling an optimal regulatory framework for innovative businesses could be a step forward to achieve a common European market for investors and innovators.

However, given the limited success of previous projects and the difficulties reaching unanimity required by Article 352 TFEU, a more promising approach might be to aim for a **targeted update of national company laws**. A directive aiming at selective harmonization of different legal forms in the Member States could still bring important improvements for businesses. However, in this case, it is especially **important to ensure easy use and standardisation to reduce transaction costs** in the interest of founders and investors. The Societas Europaea (SE) is not one uniform corporate form but in fact twenty seven variants⁶³ due to different implementation in the Member States and has been criticised for its complexity.⁶⁴ Introduced in 2004,⁶⁵ it has been adopted by some of the biggest European companies that have resources to investigate the legal rules applicable in their respective member state. Investors likely to be interested in a European innovative company might hesitate to put resources in investigating fragmented legal structures especially when deciding whether to invest in smaller Member States. Therefore, the report discusses how innovative tools such as the standardised documents suggested below (5.2), can help to reduce the effects of regulatory fragmentation for entrepreneurs and investors with, or even without, a supranational corporate form.

5.2. Standardised documents

In combination with a new company form or a targeted harmonisation of the member state's company law, the European Union could offer standardised documents such as shareholder agreements and articles of association for a small number of typical scenarios. If such model documents were used, **registration** could be quick and **costs for legal advisors brought down**. Such lowered costs could make these tools attractive for investors and founders alike and lower market entry barriers to invest especially in smaller Member States. The Draghi Report recommended that the Commission introduce „**a ,one-stop shop' in all official EU-languages**".⁶⁶ Standard documents could be part of this shop.

This platform could be monitored by an independent institution such as a European Research Centre for Innovative Businesses or by the European Commission. Whoever administrates this platform must be in close contact with entrepreneurs, investors, legal advisors and employees, in order to be open to changes in these stakeholders' needs.

5.2.1. Standardised shareholder agreements

Standardised, fair model shareholder agreements of **high quality** that could be **offered open access on a central platform**, could improve the attractiveness of the European market for investors. After

⁶³ European Commission, COM (2010)676 The application of Council Regulation 2157/2001 of 8 October on 2001, on the Statute for a European Company of 17.11.2010, p. 9.

⁶⁴ See only Marios Bouloukos, The European Company (SE) as A Vehicle for Corporae Mobility within the EU: A Breakthrough in European Corporate Law? *European Business Law Review* (2007) p 535.

⁶⁵ Krysztof Oplustil, Christoph Teichmann (eds) *The European Company – All over Europe* (2004).

⁶⁶ *Mario Draghi*, The future of European competitiveness – B In-depth analysis and recommendations (2024) p. 254.

all, rights and duties of investors and founders are mainly regulated through such agreements. To be successful, such shareholder agreements should be **drafted in close cooperation with market experts** from law firms, founders' associations and investors and offer a fair balance of the interests of founders and investors. There are successful examples for this approach. In the US, Y Combinator offers the SAFE (simple agreements for future equity)-documents⁶⁷ as instruments for early stage funding.⁶⁸ In Germany, in 2018, the BAND, the Business Angels Netzwerk Deutschland (Business Angles Network Germany) and the German Startup Verband (Association of startups) have joined forces with law firms to create the GESSI model documents.⁶⁹ These documents are downloaded and used with little or no legal advice, once trust in them was built.

5.2.2. Standardised articles of association

Together with standardised shareholder agreements, the EU should offer standardised articles of association also adjusted to a small number of typical scenarios. Such model articles of association could be adjusted to a new **supranational European corporate form**. This way, founders and investors could save time and money on legal advice. Moreover, for legal advisors, such model articles of association could reduce the time otherwise necessary to get used to the new corporate form.

If a targeted **update of national company law** by means of a directive was chosen, standardised articles of association could still be useful. After all, entrepreneurs do not care so much how the legal entity they use is called as long as it "does the job". **Offering ready-made solutions** of high quality, that work and save time and money, **could ease investments all over Europe**. Moreover, using such model articles of association offered by the EU could be a good argument against judicial review declaring clauses void in different Member States.⁷⁰

Again, such model articles of associations could be drafted for a limited number of scenarios by experts aiming for a fair balancing of interests of both founders and investors. In Germany, for example, model articles could be offered for the GmbH, in the Netherlands the BV. Using the model documents, **similar companies could be set up in different Member States**. If such model articles were used, **a European label** could be offered to mimic the signalling effect of a supranational legal form.

5.3. Conflict resolution

European innovative companies operating under the 28th regime might face the challenge of legal uncertainty, if legal rules were applied differently in different languages all over Europe, creating

⁶⁷ Y Combinator, Safe Financing documents <https://www.ycombinator.com/documents#about> (last accessed 12. June 2025).

⁶⁸ See also IMF Working Paper – Lifting Binding Constraints on Growth in Europe,(2025) p. 13 arguing in favour of standardised investment procedures and accounting standards.

⁶⁹ BAND, Startup Verband Deutschland, Standardverträge (GESSI) <https://www.business-angels.de/standardvertragswerke/gessi/>.

⁷⁰ Enriques, Nigro and Tröger suggest such model documents as well, stressing the importance of insulating them against judicial review by courts *Luca Enriques, Casimiro A. Nigro, and Tobias H. Tröger, Mandatory Corporate Law as an Obstacle to Venture Capital Contracting in Europe: Implications for Markets and Policymaking, Working Paper 2025, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5183256.*

uncertainty and legal fragmentation. Without specialised, high-quality adjudication, case law for the 28th regime may not evolve at all, because most cases would just go to arbitration and decisions not published. This **legal fragmentation might discourage international investors**. A solution could be to make a European court, or specialised courts, or judges in the Member States responsible for deciding cases arising in relation to the 28th regime.⁷¹

In the last years, **commercial courts**⁷² where specialised judges hear cases in English have been introduced in Member States such as France,⁷³ Germany⁷⁴ and the Netherlands.⁷⁵ These courts could be chosen to hear cases on the 28th regime. Another option, especially for Member States without such a commercial court, would be to refer the case to a genuine European court. While the latter may ensure uniform application of the law even more, the former, national courts, may be more familiar with national law and thus better equipped to solve cases relating to both national law and the 28th regime.

No matter what courts are chosen, judges must be **highly competent, procedures efficient**, it should be possible for parties to **litigate cases in English**, and also to find respect for the need to **protect business secrets**. A **uniform application of the law concerning the 28th regime** could be encouraged through organised exchange between these judges, building on European Networks such as the EJTN (European Judicial Training Network)⁷⁶. While many businesses might still prefer arbitration, such specialised public courts might be a cheaper alternative and ensure that the law is applied the same way to all innovative European companies.

5.4. Combining traditional measures and innovative tools

The goal of the 28th regime is to support innovative companies to grow to their full potential within the framework of the European Union with its 27th Member States with their different legal traditions, legal systems and judicial systems enforcing these rules. As the discussion above has shown, adopting traditional measures such as directives to be implemented by the Member States might not be enough

⁷¹ IMF Working Paper – Lifting Binding Constraints on Growth in Europe (2025) p. 13.

⁷² *Xandra Kremer and John Sorabji*, International Business Courts in Europe and Beyond – A Global Competition for Justice? 12 *Eramus Law Review* (2019) 1.

⁷³ At the International Chamber of the Paris Commercial Court and Court of Appeal, Cour d Appel de Paris, Avocats Barreau de Paris, Protocole relative a la procedure devant la Chambre Internationale de la cour d' appel de Paris (2018); see *Alexandre Biard*, International Commercial Courts in France: Innovation without Revolution, *Erasmus Law Review* (2019) p. 24.

⁷⁴ Introduced by Gesetz zur Stärkung des Justizstandorts Deutschland durch Einführung von Commercial Courts und der Gerichtssprache Englisch in der Zivilgerichtsbarkeit of 4.7.2024 (§§ 610–614 Civil Procedure Act). Commercial Courts are located, for example in Hamburg, München, Frankfurt Main and Stuttgart see only for Commercial Court Stuttgart: in Baden-Württemberg: <https://www.commercial-court.de/en/commercial-court>; for Commercial Court Düsseldorf see: https://www.olg-duesseldorf.nrw.de/commercial_court/index.php. *Gisela Ruhl and Nicolas Dewitte Langefeld*, International Commercial Courts in Germany: Attractive Alternative for Big Business, *Journal of Law and Commerce* (2025) p. 43.

⁷⁵ Netherlands Commercial Court (NCC) was introduced on 1.1.2019. <https://www.rechtspraak.nl/English/NCC/Pages/default.aspx> *Eddy Bauw*, *Commercial Litigation in Europe in Transformation: The Case of the Netherlands Commercial Court*, *Erasmus Law Review* (2019) p. 15.

⁷⁶ <https://ejtn.eu/about-us/>.

to create maximum impact with the 28th regime. While these questions require much more discussion, a few ideas shall be submitted here.

First, the focus should be on the **needs of innovative businesses** and the easiest ways to support them. Reducing complexity and transaction costs must be at the centre of the discussion and all measures taken.

Second, when this goal is pursued, **different measures** and tools, and a **smart mix** combining them, should be considered. Traditional legislation might be necessary to meet some needs, but other, more **innovative tools** should be considered as well, such as the proposal of standardised documents suggested above or the proposals in Chapter 6 concerning long-term orientation. Innovative measures can complement regulation and thereby enhance positive effects.

Third, all legislative measures and innovative tools must be approached in **a holistic way**, keeping in mind not only the interaction with European but also national law. Regulatory fragmentation is a challenge for European growth. For entrepreneurs, it does not matter if fragmentation and confusion is created by European law, national law or their interaction. **Tax law** is of particular importance for businesses. If this is not taken into consideration, sensible proposals might be rendered useless just because of unfavourable effects of national tax law.

Fourth, **discussing and designing such innovative tools might require a European forum** to do so. Such a forum could be open for discussing the needs of different innovative businesses from exit oriented startups to those with long-term orientation and impact, taking into consideration the input of stakeholders such as managers, investors, innovators and employees. Especially the needs and tools discussed in Chapter 6 would benefit from in-depth discussion with experts from various fields.

6. FLEXIBILITY AND LONG-TERM ORIENTATION – IDEAS FOR INNOVATION THE EUROPEAN WAY

KEY FINDINGS

A supranational European legal form or a targeted update of national company law adjusted to the needs of innovative businesses should start with a clear analysis of the needs of founders and investors of innovative companies.

First of all, European innovative companies need **more investments, especially from venture capital funds**, in particular in later stages of their development. A 28th regime should provide tools that make such investments easier. Classic venture capital funds and many founders are oriented towards a **lucrative exit**. However, a significant share of founders has a **long-term perspective**. The 28th regime should provide a framework that can be used by both groups of founders (6.1).

In particular, company law introduced or harmonised by the 28th regime should offer founders and investors the freedom to design articles of association and shareholder agreements freely, adjusting them to their needs and preferences (6.2).

To support long-term orientation, the study examines various tools, including **different classes of shares and multiple voting rights (6.3.1), veto shares (6.3.2), and innovative investment tools** that enable the raising of capital without issuing shares with voting rights. Examples of such investment tools include revenue-based finance and mezzanine capital. The 28th regime should also allow governance instruments that enable reliable **commitment to purpose**, such as those found in the French société à mission (6.3.4), as well as **instruments that enable workers to participate in the business's value creation**, such as those found in ESOP schemes (6.3.5).

Elements of steward ownership, such as veto shares, an irrevocable division of shares with voting rights and shares with profit rights, and asset locks, demonstrate a commitment to long-term orientation and values in a reliable way (6.4). Young businesses cannot pay workers as well as established ones unless they raise a lot of capital or have participate workers in the value creation. A business that is not oriented towards lucrative exit but has an independent perspective will not be able to offer that. However, skilled employees might be ready to work for less if they believe in the business's mission and can be sure that a lucrative exit is not made later for the sole benefit of the founder. Elements of steward ownership can ensure that and **protect against killer acquisitions**. Avoiding the sale of innovative companies to certain investors can be important for Europe's strategic and economic independence.

6.1. Needs of founders and investors

A supranational European legal corporate form or a targeted update of national company law, adjusted to the needs of innovative businesses, should start with an analysis of the needs of founders and

investors of innovative companies. First of all, European innovative companies need **more investments, especially from venture capital funds**, in particular in later stages of their development. A 28th regime should provide tools that make such investments easier. Classic venture capital funding is oriented towards a **lucrative exit**. Surveys among European founders show that a significant percentage of them indeed establishes their business with such an exit in mind. However, as the data in Table 1 shows, not all founders share this view. A significant share of founders has a **long-term perspective**. The 28th regime should provide a framework that can be used by both groups of founders.

Table 1: Startups

	DSM	Austrian Startup 2024	ESM 2016
Goal of founders is a lucrative exit	2020: 44,3% 2023: 65,5%	Complete exit: All: 19,5% Deep tech: 25,4% Other startups: 18,2%	Rather likely/likely/very likely: exit within first 10 years: 63,1%, IPO: 21,7%
Founders plan to stay in their business	2020: 45,1% 2023: 34,5%	All: 58,7%, Deep tech: 40,03% Other startups 62,6%	Rather likely/likely/very likely that they will stay in their business: 82,4%

Source: Deutscher Startup Monitor (2020) p. 47; Deutscher Startup Monitor (2023) p.39; Austrian Startup Monitor (2024) p. 46; European Startup Monitor (2016) p. 48.

6.2. Freedom for founders and investors

A supranational corporate form for innovative businesses should be **flexible**⁷⁷ enough to allow founders and investors to design articles of association and shareholder agreements according to their needs. This includes the establishment of government bodies and raising capital without corporate minimum capital rules. Being able to **transfer shares easily and quickly** is also important.

Establishing a **subsidiary** can be an interesting option for more mature businesses to use business opportunities in different Member States. Without it, it is difficult to unleash the innovative potential of the single market.⁷⁸ The company form of the 28th regime should also be flexible enough to be used both as a holding and subsidiary. Some basic principles of the **law of groups**, such as the group interest might also be considered. The concept of the group interest is well-known in different legal systems,

⁷⁷ See for the importance of flexibility for an efficient VC-ecosystem with a comparison of the US, Italy and Germany: *Luca Enriques, Casimiro A. Nigro, and Tobias H. Tröger*, Venture Capital Contracting as Bargaining in the Shadow of Corporate Law Constraints, Working Paper 2025, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5183235; see also: *Luca Enriques, Casimiro A. Nigro, and Tobias H. Tröger*, Mandatory Corporate Law as an Obstacle to Venture Capital Contracting in Europe: Implications for Markets and Policymaking, Working Paper 2025, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5183256.

⁷⁸ *Peter Hommelhoff*, Ein europäisches Gruppenrecht für den Binnenmarkt in Geibel, Heinze, Verse (eds) Binnenmarktrecht als Mehrebenensystem (2023) p. 114.

particularly in relation to the Rozenblum doctrine, which, under certain conditions, permits the directors of a subsidiary company to take the group interest into account when making decisions that could prejudice the subsidiary.⁷⁹

For young companies, that cannot yet pay market value wages, it is important to **let employees participate in the growing value of the business**, particularly when employees have unique skills and the company cannot pay them at full market value in the beginning. The Austrian FlexCo offers an example of how this can be achieved, taking also tax law into consideration.⁸⁰ The Polish Simple Joint Stock Company Polish (Prosta spółka akcyjna PSA) also allows shares without a nominal capital.⁸¹ Both corporate forms also allow that the governing body decides on issuing new shares.

Tools supporting innovative, quickly growing companies should include **cheap and easy online registration** as outlined by the report of Florian Möslin and a single digital identity valid throughout the European Union.⁸²

6.3. Tools for long-term orientation and independence

Competitiveness and growth in Europe should go hand in hand with social justice and sustainable development. Many founders care deeply about their businesses and its contribution to society, as the survey above, but also the growing importance of impact startup, shows. Many founders also wish to retain control over their business. Moreover, some innovation takes longer to develop than the 10 years often given to startups. Especially enterprise foundations like Zeiss or Novo Nordisk have taken a long-term perspective on R&D. Indeed, there is evidence that enterprise foundations spend more on R&D than other companies which helps not only their own innovativeness but economic growth generally.⁸³

Finally, when public money has been invested in innovative companies, especially in areas such as healthcare, defence and space, **avoiding killer acquisitions** from outside the EU may also benefit strategic European interests. Today, more and more European businesses are bought by investors from outside Europe, especially the US.⁸⁴ Takeover regulation does not seem adequate for small businesses and contractual agreements founders need to sign before receiving public funding seem not to be adequate either. Reasons for such sales are the need for new investment but also the “silver tsunami”

⁷⁹ European Model Company (2017) Chapter 15, p. 371–372; *Piere-Henri Conac*, The Chapter on Groups of Companies of the European Model Companies Act, ECFR (2016) p. 301.

⁸⁰ An important element of the new Austrian FlexCo *Holger Fleischer/Matthias Pendl*, Flexible Kapitalgesellschaft (FlexKapG) in *Holger Fleischer* (ed) *Rechtsformneuschöpfungen im in- und ausländischen Gesellschaftsrecht* (2024) p.699, 716–718, see for the important tax implications: p. 720.

⁸¹ *Adam Opalski, Krzysztof Oplustil, Tomasz Sójka, Anne-Marie Weber*, The Simple Joint Stock Company: Emergence of a New Close Company in Poland, ECFR (2024) p. 604, 615.

⁸² See *Mario Draghi*, The future of European competitiveness – A Competitiveness strategy for Europe (2024) p. 29.

⁸³ *Steen Thomsen and Nikolaos Kavadis*, Enterprise Foundations. Law, Taxation, Governance, and Performance”. *Annals of Corporate Governance* (2022) Vol. 6, No. 4, 227, 293–294.

⁸⁴ *Harriet Agnew and Brooke Masters*, The relentless advance of American Asset Managers in Europe, *Financial Times* December 17 2024 <https://www.ft.com/content/bc1b6eaf-dd5f-4e63-b4dc-90a30e9bec58>.

of retiring entrepreneurs who cannot find a **successor**.⁸⁵ While succession is not at the heart of the discussion on the 28th regime, opening opportunities for business succession, e.g. of workers, can be an important tool in helping to unleash also the innovative potential of SMEs in a socially inclusive economy.

Therefore, tools and options that founders can choose freely to keep their businesses independent and to take a long-term perspective to develop their businesses in Europe with their jobs, growth and know-how according to certain values should be part of the discussion of a 28th regime. This toolbox for independent businesses should look at shares with multiple voting rights, veto shares, innovative finance and also at steward ownership.

6.3.1. Different classes of shares

The freedom of founders to design articles of associations according to their needs should include creating different classes of shares like **(multiple) voting rights⁸⁶ and preferred shares** without voting rights. Retaining shares with multiple voting rights enables founders to secure control over their business. Many big tech-companies in the US were founded this way. The EU has taken a critical approach to multiple voting rights before, but has adopted a more liberal approach to support SME financing and listing with Directive 2024/2810, acknowledging the importance of such tools for keeping control.

6.3.2. Veto-shares

The legal regime should also allow creating non-economic shares with the **right to veto certain decisions such as a change of the governance structure, a change of the company's purpose or the transfer of shares to investors outside Europe**. The chocolate producer Tony's Chocolonely for example, has installed guardians with veto-rights to guard its purpose and sustainable business strategies as a trust creating promise for its stakeholders.⁸⁷

The founders could choose a foundation to hold such a veto share, thus becoming a long-term guardian of the business. For certain critical infrastructure projects funded with public money, a structure like this could create trust for stakeholders like public and impact investors, employees and the public who would like to trust the promise of a business of value and long-term orientation.

6.3.3. Innovative investments tools

Another tool helping founders to secure the independence and thus long-term perspective of their businesses could include investment tools that are not tied to shares with voting rights such as **revenue**

⁸⁵ In Germany, 626.000 companies planning a business transfer over 5 years (2023-27) *Christine Volk*, Status report on business succession, SME transfer plans are picking up in speed. https://www.kfw.de/About-KfW/Newsroom/Latest-News/Pressemitteilungen-Details_795968.html.

⁸⁶ See for a comparative discussion highlighting the liberal approach e.g. in the US. Klaus Hopt and Susanne Kalss, Multiple-voting shares in Europe - A comparative and economic analysis, ECGI Working paper No. 786/2024.

⁸⁷ <https://tonyschocolonely.com/pages/mission-lock>.

based finance⁸⁸ and **mezzanine capital**.⁸⁹ Today, the most usual form of investment all over Europe is via acquisition of shares. With such shares, influence is given to outsiders. However, there are other tools apart from traditional bank loans, which are very common for some European businesses that wish to retain their independence. In Member States like Germany, financing instruments already exist that allow profit participation rights without actual voting rights as a shareholder. Such tools should be explored on a European level to **make them more common and easy to use across borders**. This way, new financing opportunities for entrepreneurs wishing to stay independent, including steward owned businesses could be opened.⁹⁰

6.3.4. Purpose

Over the last decade, there has been an important discussion on the role of corporate purpose.⁹¹ Innovative legal forms, especially the French société à mission, have introduced tools that allow a company to commit to a common-good purpose in a meaningful way, backed up by governance tools that make the commitment reliable.⁹² In Italy, the società benefit has followed a similar path, also supporting purpose oriented entrepreneurship. It has built on the example of the US-American benefit corporation⁹³ but has adopted a different approach with respect to governance.⁹⁴ In case of the société à mission, such tools include a board supervising how the company lives up to its commitment. It is not the place here to discuss this movement fully. However, a legal form introduced or harmonised under the 28th regime should allow founders wishing to do so the flexibility to commit to such a purpose and introduce governance benefiting from the French and Italian experience.

6.3.5. Worker Ownership

As already mentioned, the company law of the 28th regime should be flexible enough to allow employees to participate in the value creation of the business. While solving the challenge of business

⁸⁸ See for an overview: *Grant Ejimone*, Revenue Based Finance Statistics for 2025 (2025) <https://www.absrbd.com/post/revenue-based-finance-statistics> (last accessed 13 June 2025); *Allied Market Research*, Revenue Based Financing Market (2024) <https://www.alliedmarketresearch.com/revenue-based-financing-market-A07537#:~:text=The%20global%20revenue%2Dbased%20financing,39.4%25%20from%202024%20to%202033> (last accessed 13 June 2025).

⁸⁹ Market Research Future, Mezzanine Finance Market is Projected to Reach \$420, Billion Market Value by 2034 with a 7.88 CAGR (2025) <https://www.einpresswire.com/article/780578983/mezzanine-finance-market-is-projected-to-reach-420-79-billion-market-value-by-2034-with-a-7-88-cagr>. (last accessed 13 June 2025).

⁹⁰ Purpose Foundation, Steward Ownership (2021) pp. 29-40.

⁹¹ *Colin Mayer*, Firm Commitment, 2013; *Colin Mayer*, Prosperity – Better Business Makes the Greater Good, 2018; *Holger Fleischer*, "Corporate Purpose – A Management Concept and its Implications for Company Law", *European Company and Financial Law Review* 2021, 161; *Klaus Hopt*, Corporate Purpose and Shareholder Value, in Jens-Hinrich Binder, Klaus J. Hopt and Thilo Kuntz (eds) *Corporate Purpose, CSR and ESG* (2024) p. 17.

⁹² *Blanche Segrestin, Armand Hatchuel and Kevin Levillain*, When the Law distinguishes between the Enterprise and the Corporation: The Case of the New French Law of Corporate Purpose, *Journal of Business Ethics* (2021) 1-13; *Jérémy Lévêque, Kevin Levillain, Alain Schnapper, David-Emmanuel Vivot*. L'évaluation de la société à mission. 2020.

⁹³ See part II in Henry Peter, Carlos Vargas Vasserot and Jaime Alcalde Silva (eds) *The International Handbook of Social Enterprise Law – Benefit Corporations and Other Purpose-Driven Companies* (2023).

⁹⁴ *Livia Ventura*, Social Enterprises and Benefit Corporations in Italy in Henry Peter, Carlos Vargas Vasserot and Jaime Alcalde Silva (eds) *The International Handbook of Social Enterprise Law – Benefit Corporations and Other Purpose-Driven Companies* (2023) p. 651.

succession of SMEs in Europe is not the goal of the 28th regime, it should keep in mind the ESOP model and other tools for workers' buyout that give workers a voice in the governance of the firm.⁹⁵ When designing such options, it should be kept in mind that providing shares below value to workers may have undesirable effects in national tax law (in Germany so called "dry income problem").

6.4. Steward ownership as an option

Long-term orientation and security against killer acquisitions could be facilitated by allowing founders to choose **steward ownership as an option** or **elements of it**. Like the other tools suggested in this report, steward ownership will not be attractive to all founders but can offer another option to design the business they want to develop. This would allow founders in Europe to use the concept of steward ownership easier than in the US, where the establishment of the new Patagonia structure was challenging.

6.4.1. The concept of steward ownership

In steward ownership, a **business is controlled by stewards acting in the interest of the business** while **profits are seen as a means to an end** that should mainly strengthen the business but may also support charitable causes. Stewards are meant to stay closely connected to the business and not to sell their position or pass it on through inheritance. Though stewards are paid for their work in the business, profits may not be distributed to them. This does not mean that investment in steward owned businesses is impossible, rather it means that investors do not receive control rights over the business. They can invest in shares without voting rights, revenue based finance and use mezzanine capital.⁹⁶

This **non-distribution constraint** is often described as a complete **capital or asset lock**, a concept familiar from charitable entities and special legal forms for social enterprises.⁹⁷ In the EU, there are different examples of asset-locks in specific corporate forms or – as in the case of the Danish registrerede socialøkonomiske virksomheder – labels indicating social businesses.⁹⁸ The latter may, for example distribute only 35% of its profits. Other forms or labels allow no profit distribution at all or up to 50%, like the regime of the entreprise solidaire d'utilité sociale (ESS) or the Luxembourg société d'impact sociétal. The Romanian întreprinderil sociale may distribute only 10% of profits. In Slovenia

⁹⁵ See the ESF+ Study on Workers' Buyout (2025) <https://www.fi-compass.eu/esfplus/workers-buyout>; the work of <https://ied.si/en/> and Part 3 in *Marija Bartl, Rutger Claassen, Nena van der Horst* (eds) *Whitepaper Sustainable by Design* (2024); see for a US perspective: <https://smlr.rutgers.edu/faculty-research-engagement/institute-study-employee-ownership-and-profit-sharing>.

⁹⁶ See for the concept: *Purpose Foundation, Steward Ownership* (2021) pp. 9-16; *Anne Sanders and Noah Neitzel, Steward Ownership – Concept, Potential and Implementation in Germany and the Netherlands* available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5178366; *Anne Sanders, Binding Capital to free purpose: Steward Ownership in Germany*, 19 ECFR 622 (2022); *Marvin Reiff, Verantwortungseigentum* (2023).

⁹⁷ *Antonio Fici, A statute for European cross-border associations and non-profit-organizations* (2021) p. 65; see also the chapters in *Dana Brakman Raiser, Steven A Dean and Giedre Lideikyte Huber, Social Enterprise Law* (2023).

⁹⁸ K. Engsig Sørensen and M. Neville, *Social Enterprises: How should company law balance - Flexibility and Credibility?* (2014) 15 *European Business Organization Law Review* 267, 298-303; J.S. Liptrap 'A More Socio-Environmentally Responsive Way to Organise the Firm? A Case Study'; J.S. Liptrap 'A More Socio-Environmentally Responsive Way to Organise the Firm? A Case Study on Danish Social Enterprise Law' 19 *European Company and Financial Law Review* (2022) p. 517.

and Poland, no distribution of profits is allowed. In the event of liquidation and deregistration, most European schemes require the remaining assets to be transferred to another social enterprise. Outside the EU, the British community interest company offers a successful example for a specific legal form for social enterprises, allowing a distribution of up to 35% of its profits.⁹⁹

In social enterprises, the asset lock assures donors and other stakeholders, that profits are invested in the enterprises' purpose. In steward ownership, the asset lock ensures commitment to long-term orientation and impact because decisions cannot be made in the interest of short-term profits. To create trust in this long-term orientation, an important element of the concept is that this form is **irrevocable**.

While social enterprises pursue beneficial purposes, steward owned businesses are free to choose any legal purpose. It can be supporting the common good but developing the business in the interest of its stakeholders is enough. While investors may participate in the businesses' profits and may have information and possibly consultation rights, they should not have control over the business.¹⁰⁰

6.4.2. Examples and potential of steward ownership

Legal structures implementing the concept of steward ownership may be seen in **enterprise foundations**,¹⁰¹ foundations controlling companies as in the Danish Novo Nordisk and Carlsberg or the German Zeiss and Bosch. Research shows that these businesses work both profitably as well as responsibly and long-term oriented, contributing both to economic growth and social equality.¹⁰² Moreover, their unique ownership structure might have been a factor to keep these valuable businesses within Europe. Other legal structures used to implement the concepts include **perpetual purpose trusts** in the US¹⁰³ and **veto-share models** in Germany that prevent a change of articles of association blocking profit distribution.¹⁰⁴

⁹⁹ For a comparative perspective: *Florian Möslein and Anne Sanders*, Corporate Asset Locks: A Comparative and European Perspective, *French Journal of Legal Policy* (2023) p. 51-82; *Antonio Fici*, Models and Trends in Social Enterprise Regulation in the European Union, in Henry Peter, Carlos Vargas Vasserot and Jaima Alcalde Silva (eds) *The International Handbook of Social Enterprise Law* (2023) p. 153-172.

¹⁰⁰ Purpose Foundation, *Steward Ownership* (2021) pp. 9-16; *Anne Sanders and Noah Neitzel*, Steward Ownership – Concept, Potential and Implementation in Germany and the Netherlands available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5178366; *Anne Sanders*, Binding Capital to free purpose: Steward Ownership in Germany, *ECFR* (2022) p. 622; *Marvin Reiff*, *Verantwortungseigentum* (2023).

¹⁰¹ See *Anne Sanders and Steen Thomsen*, *Enterprise Foundation Law in Comparative Perspective* (2023); See also the European Law Institute Project on Enterprise Foundations which will present a Model Law on Enterprise Foundations in September 2025, *Steen Thomsen and Anne Sanders* both serve as reporters <https://www.europeanlawinstitute.eu/projects-publications/current-projects/current-projects/eli-enterprise-foundations-in-europe/>.

¹⁰² *Steen Thomsen and Nikolaos Kavadiis*, Enterprise Foundations. Law, Taxation, Governance, and Performance". *Annals of Corporate Governance* (2022) p. 227–333; *David Schröder and Steen Thomsen*, Foundation Ownership and Sustainability (2023) *Academy of Management Proceedings* (Sonia Taneja ed., 2023); *Rasmus Feldthusen and Steen Thomsen*, How enterprise foundations can sustain sustainability: The European Relevance of a Nordic Ownership Model, in Beate Sjøfjell and Jukka Mähönen (eds.), *Nordic Company Law: Broadening the Horizon* (2023) p.111.

¹⁰³ *Susan N. Gary*, The Oregon Stewardship Trust: A New Type of Purpose Trust that enables Steward Ownership of a Business, 88 *UNIVERSITY OF CINCINNATI LAW REVIEW* 707, 725-729 (2020).

¹⁰⁴ *Purpose Foundation*, *Steward Ownership* (2021) p. 17-19.

Highly innovative businesses such as Open AI, Patagonia and Ecosia, Europe's largest independent search engine,¹⁰⁵ show that such structures can be attractive for entrepreneurs who want to communicate the importance of long-term orientation and values beyond profit maximization. By irrevocably separating power in the business from profit orientation, founders can be sure that their successors will also not make business decisions because of personal profit interests but in the best interest of the business. Businesses using such structures range from media companies, caring for their independence, traditional family businesses, wishing to secure a long-term perspective, food retailers to cyber security companies. The structure could also be used for critical infrastructure projects.¹⁰⁶

On a continent undergoing demographic change, young European businesses need good arguments to communicate to **young talent** that they come and work for them even though a young business is often not able to pay a full market price. In an exit-oriented startup, employees can participate in the growing value of the company, when the company is sold to the highest bidder. In a long-term oriented startup with an asset lock, employees may rest assured that a founder cannot become rich himself when selling the company while the employee accepted a lower than market wage to help the company's mission. Moreover, within a steward owned business, control might be handed to the next generation without a need to buy a business, thus making it easier to hand over a business to workers or other interested people who will also pass on their position to a next generation of stewards, not investors.

6.4.3. Movements for a new legal corporate form in Germany and the Netherlands

In both Germany and the Netherlands, initiatives advocating **new legal forms** to allow SMEs to implement steward ownership have gained political traction. In Germany, the introduction of a new legal form for steward owned businesses is part of the coalition agreement of the 2025-2029 government.¹⁰⁷ In 2024, at the request of three rapporteurs in the German parliament, an academic working group developed a new draft law to establish a "steward owned company" as a distinct legal form. This distinct legal form has members not shareholders and a special governance structure to safeguard the principles of steward ownership.¹⁰⁸ In early 2025, researchers and practitioners submitted a draft with principles for a Dutch legal form for steward owned businesses to the Dutch Minister of Justice, following a parliamentary resolution of April 16, 2024. The Dutch ideas build on the Dutch limited liability company, the BV.¹⁰⁹

¹⁰⁵ <https://www.ecosia.org/>.

¹⁰⁶ See for case studies: Purpose Foundation, *Steward Ownership* (2021) pp. 41-100.

¹⁰⁷ *CDU, CSU, SPD, Verantwortung für Deutschland, Koalitionsvertrag 2025-2029* (2025) para 2815-2819. The idea was already part of the coalition agreement of the previous German government. See on the first drafts *Anne Sanders, Binding Capital to free purpose: Steward Ownership in Germany*, 19 *ECFR* 622 (2022); which was discussed controversially. For a critical assessment in English see *Birgit Weitemeyer, Germany* in Dana Brakman Raiser, Steven A Dean and Giedre Lideikyte Huber, *Social Enterprise Law* (2023) p.249, 268.

¹⁰⁸ *Anne Sanders, Barbara Dauner-Lieb, Simon Kempny, Florian Möslin, Noah Neitzel and Christoph Teichmann, Gesetz zur Einführung einer Gesellschaft mit gebundenem Vermögen* (2024).

¹⁰⁹ For the German and Dutch discussion and proposals for legislation see: *Anne Sanders and Noah Neitzel, Steward Ownership – Concept, Potential and Implementation in Germany and the Netherlands* available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5178366.

The discussion in Germany and the Netherlands has shown the **need for special governance structures**.¹¹⁰ Stewards must be prevented from deliberately circumventing the separation of control and profit rights (asset lock). For example, stewards and managers must be prevented from using their control to extract profits through lucrative advisory contracts. The German draft law suggested a special audit and membership in a supervisory association. In many European legal systems, foundations are supervised by public supervisory authorities, public prosecutors or courts. Another option are internal governance bodies like a supervisory board, as is required for example by the Private Foundation in Austria.¹¹¹ At the time of dissolution, just as with foundations and social enterprises, assets remaining after paying debts and repaying investments in the business, must be distributed to a purpose fixed in the articles of association, e.g. a charitable purpose or another steward owned business.

6.4.4. Elements of steward ownership within the 28th regime

A European legal entity for steward owned businesses seems unlikely, as supranational forms have faced challenges in the past and steward ownership is not yet widely known in Europe. The proposal for a **European Cross Border Association** could be helpful for steward owned businesses, because it allows economic activity as long as profits are not distributed to members. However, a public benefit purpose is necessary, and an association is not a legal form designed for economic activity.

Foundation law is often used to implement steward ownership in the Member States. The European Law Institute–project “**Enterprise foundations in Europe**”¹¹² plans to publish a model law in September. This model law could provide a legal framework for steward ownership, even though it also includes regulations on family foundations, which are not part of the steward ownership concept. However, given the diversity of national foundation laws, harmonisation on the European level seems difficult. The proposal for a European Foundation¹¹³ pursuing a public benefit purpose was not successful, even though there is agreement between Member States that foundations may pursue the public good. Foundations pursuing economic activity could be even more controversial. Therefore, the model law for Enterprise Foundations is designed to provide inspiration to Member States to reassess and possibly reform their own law on enterprise foundations.

A better and more realistic way than the introduction of a distinct supranational legal form is to support Member States in their experimentation with distinct corporate forms for steward ownership, such as currently developed in Germany and the Netherlands. This way, a member state may also choose appropriate governance mechanisms and also adjust these legal forms to national tax law, ensuring tax

¹¹⁰ See *Anne Sanders and Noah Neitzel, Steward Ownership – Concept, Potential and Implementation in Germany and the Netherlands* (2025) pp. 34–42 available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5178366

¹¹¹ See for different governance tools of foundations the Chapters in Sanders/Thomsen, *Enterprise Foundations in Comparative Perspective* (2023).

¹¹² <https://www.europeanlawinstitute.eu/projects-publications/current-projects/current-projects/eli-enterprise-foundations-in-europe/>.

¹¹³ Proposal for a Council Regulation on the Statute for a European Foundation COM(2012)35.

neutrality avoiding both discrimination as well as a preferential tax treatment of steward owned businesses.

Within the 28th regime, Member States could be requested to ensure that steward ownership can be implemented as an option in some form or another, either with a distinct legal form or by designing articles of association this way. Elements of steward ownership could also be introduced as options in the 28th regime by providing enough flexibility to allow founders to design steward ownership elements for their needs. First, company law could offer the option to **irrevocably establish non-economic shares with voting rights controlling the company and non-voting shares that participate in the company's profits**. It should also be possible to cap profit distributions altogether or partly (eg. 100% 70%, 50%, 30%). This way, entities for social businesses could also be designed easily.

Second, the **veto-share model** suggested under 6.3.2 could be used to implement steward ownership and secure the company's purpose and values for the future.

Transparency about such special structure could be created through registration.¹¹⁴ As discussed at 6.4.3 the **implementation of governance** structures like a mandatory audit, supervisory board or membership in a supervisory association would be advisable and could be chosen by Member States in line with their legal traditions. In case such entities aim to qualify as charities under national law, they must of course obey the specific national charity and tax laws.

As a final observation, it should be kept in mind that **national tax laws could affect the attractiveness of steward ownership elements**. While preferential tax treatment should not be offered for adopting such structures, tax rules may discourage usage just like the use of shares that allow workers to participate in the growing value of the company may be a challenge from a tax perspective (see 6.3.5).

¹¹⁴ See for that the proposal of *Florian Möslein*, Simplification of Registration of Companies in the 28th regime (2025) 3.3.

7. RECOMMENDATIONS

- To help close the European innovation gap, the focus should be on the **needs of innovative businesses** rather than defining innovative businesses.
- **Bureaucratic hurdles should be avoided and legal measures and tools adopted that are as easy to use as possible. This way**, the 28th regime can be widely adopted and encourage trust and investment all over Europe.
- When defining the scope of the 28th regime, the EU should adopt a **modular approach**:
 - As many as possible of the tools designed for innovative companies should be **open to all companies** that wish to use them.
 - Such open instruments could be complemented with **more targeted measures** in additional legislative instruments that offer special support to certain groups of innovative companies or prevent circumvention of important legal rules such as tax law or laws protecting creditors or workers.
 - When adopting this modular approach, ease of use and **avoiding fragmentation must be a central consideration**
- Traditional legislative measures such as directives should be used in a **smart mix with innovative tools**. The latter might be discussed in a special European forum. Such innovative tools should be designed with a holistic perspective, taking into consideration the needs of practice and effects of national tax law.
- A European supranational limited company or harmonised **company law must be flexible** enough, so that entrepreneurs and investors can design articles of associations and shareholder agreements that meet their needs.
- **Uniform application of the law** relating to the 28th regime could be ensured by making **qualified national or European courts or judges**, that offer hearings in English, responsible for cases concerning the 28th regime.
- As an innovative tool, the EU should offer **standardised, fair shareholder agreements and articles of association** of high quality, designed by experts from law, venture capital funds and entrepreneurs, already adjusted to the harmonised law of the Member States. This way, investors could bring down costs and be certain that they can invest with the same outcomes in every member state of the EU.
- Legislation and innovative tools should not only focus on the innovation of exit-oriented startups. **Innovation should be embraced the European way**. The innovative potential of both exit-oriented startups and long-term oriented businesses whose founders wish to retain control over their businesses should be acknowledged. Moreover, independent businesses are of strategic importance and can help to strengthen Europe's security and independence.

- Independent, innovative businesses can be supported by allowing options such as **multiple voting rights, veto-shares**, instruments of **revenue based finance** and elements of **steward ownership**.

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This in-depth analysis, commissioned by the European Parliament's Policy Department for Justice, Civil Liberties and Institutional Affairs at the request of the Committee on Legal Affairs, examines the scope of the proposed 28th regime. For the 28th regime to be successful, it needs to be user-friendly and widely adopted, thereby fostering trust and investment. Restricting access to 'innovative companies' could create bureaucratic obstacles that would discourage entrepreneurs and investors. Rather than restricting access, the 28th regime should be open to businesses of all kinds and designed to meet the needs of innovative businesses, including those with an exit strategy who wish to attract VC funding and those with a vision of long-term independence. Broad access to most parts of the 28th regime – especially in the area of company law – should be combined with targeted measures to a modular approach.
