

European Treaties and Steward Ownership

Purpose in Business: Steward Ownership and Enterprise
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Introduction: Member State corporate law reforms ...



#neueRechtsform 2025

**"Wir ... wollen eine neue,
eigenständige Rechtsform
,Gesellschaft mit
gebundenem Vermögen'
einführen."**

Koalitionsvertrag zwischen
CDU, CSU und SPD

21. Legislaturperiode



... vs. EU corporate law reform



The 28th Regime: a new legal framework for innovative companies 2025/2079 (INL)

Exchange of views	13 May 2025
Workshop Policy Department	4-5 June 2025
Draft report	27 June 2025
Consideration of draft report	15 July 2025
Deadline for amendments	2 September 2025
Consideration of amendments	13 October 2025
Vote in Committee	10-11 November 2025
Vote in Plenary	15-18 December 2025



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■ The work on the 28th regime has officially begun! 💡

In today's exchange of views in the Legal Affairs Committee of the [European Parliament](#), I had the chance to already outline some of the principles that will guide my work in shaping an ambitious and realistic proposal:

1. The starting point of our work will be listening to European founders and innovators, their needs and their vision on how to help them grow and scale up within the Internal Market.
2. Establishing the appropriate legal basis will be a crucial part of our work. Articles 50 and 114 TFEU hold significant potential to serve as a legal basis for this initiative.
3. We will explore elements of steward ownership, including asset locks, to equip companies with tools to protect themselves against unfair killer acquisitions.

... vs. EU corporate law reform



EUROPEAN COMMISSION

Brussels, 5.9.2023

COM(2023) 516 final

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Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on European cross-border associations

Article 3

European Cross-Border Association (ECBA)

1. Each Member State shall establish in its legal system the legal form of the European cross-border association (ECBA). Member States shall ensure that an ECBA is a membership-based legal entity, constituted by means of voluntary agreement by natural persons that are Union citizens or legally resident in the EU or legal entities with a non-profit purpose legally established in the Union, with the exception of:
 - (a) trade unions, political parties, religious organisations and associations of such entities;
 - (b) persons who have been convicted of offences of money laundering, associated predicate offences, or terrorist financing;
 - (c) persons who are subject to measures that prohibit their activity in a Member State in connection with money laundering, associated predicate offences, or terrorist financing.
2. Member States shall ensure that an ECBA shall have a non-profit purpose and any profits of an ECBA shall be used exclusively for the pursuit of its objectives, as described in its statutes, without any distribution among its members.

I. Steward Ownership at EU Level

- **Problem: Which legal basis in European treaties?**
 - Similar to supranational legal forms (like Societas Europaea, SE)
 - But potential differences
 - New, innovative legal form: No harmonisation at all
 - No distribution of profits

I. Steward Ownership at EU Level

- **Problem: Which legal basis in European treaties?**
- **Article 352 TFEU**
 - Legal basis for supranational company forms (SE Reg, EPC proposal)
 - Discussed in Draghi report for Innovative European Company
 - But requires unanimity in Council
- **Article 114 TFEU – Internal Market (Harmonisation)**
 - Avoids unanimity: Qualified majority.
 - But rejected by ECJ (2006) as a legal basis for new supranational forms
- **Article 50(2) TFEU – Freedom of Establishment**
 - Legal basis for supranational company forms (SE Dir, SUP proposal)
 - But not suitable for start-ups due to lack of cross-border structure at formation

I. Steward Ownership at EU Level

Cf. Legal Opinion of Council Legal Service (CLS) of 7 January 2025 re Art. 50 and 114 TFEU as legal basis for European cross-border associations (ECBAs):

The CLS considered that the new legal form of an ECBA is not per se a supranational legal form, understood as a 28th legal regime, and therefore, in principle, the legal bases for harmonisation of laws can be invoked. However, in the CLS's view one element of the proposed ECBA form 'does point towards a supranational character', namely the possibility to transfer its seat without dissolution or the creation of a new legal person which – in line with ECJ case-law – indicates a supranational dimension (ECJ 2 May 2006, C-436/03, para 42). Nonetheless, in the CLS's view, the new legal form can still be defended as a national legal form, subject to harmonisation, and can therefore be based on Articles 50 and 114 TFEU.

The CLS identified another problem in using the legal bases of Article 50 and 114 TFEU, namely the inclusion of economically inactive cross-border associations within the scope of the proposal. The legal bases invoked can be used only for economically active entities. Therefore, if the legal bases were to be kept (enabling to continue under the ordinary legislative procedure), it will be necessary to excluded economically inactive associations from the scope of the directive.

Moreover, the CLS pointed out that non-profit entities are explicitly excluded from the scope *ratione personae* of the freedom of establishment and freedom to provide services by virtue of Article 54 TFEU, an interpretation confirmed by ECJ case-law (ECJ 17 June 1997, C-70/95, ECJ 3 October 2006, C-290/04, para 66). Based on ECJ case-law, the CLS recalled that 'a "non-profit-making" legal person under Article 54 TFEU is one that does not aim to make a profit for, or otherwise benefit, its members. This includes such persons that pursue a charitable or social purpose.'

I. Steward Ownership at EU Level

- **Problem: Which legal basis in European treaties?**
- **Article 48(7) TEU – Passerelle Clause**
 - Proposed in Draghi report to shift Article 352 TFEU decisions from unanimity to qualified majority, but still requires unanimity to trigger
- **Article 20 TEU + Article 329 TFEU – Enhanced Cooperation**
 - Second-best alternative? Allows willing Member States to proceed with “28th regime.”
 - Operates within EU law, but creates many difficulties (freedom of establishment!)
- **Intergovernmental Cooperation (Outside EU Treaties)**
 - Lacks EU law legitimacy
- **... but “Innovative European Company”, so how about:**
 - Article 179(1) TFEU – Research and Innovation Policy? Only support.
 - Article 173 TFEU – Industrial Policy? Framework for Model Law?

II. Steward Ownership at Member State Level

- **Need to secure the strict asset lock**
 - Irreversibility by resolution
 - Exclusion of corporate conversions
- **Problem: Cross-border conversions or cross-border transfer of seat?**
 - possibility to opt out of the asset lock if foreign legal form does not provide for similarly strict asset lock?
 - example: Cross-border conversion of German “GmbH m. geb. V.” into a French S.à r.l.
 - would jeopardize the asset lock
 - but: Can it be excluded? Would exclusion contradict to EU law?
 - **Focus on fundamental freedoms**

Freedom of establishment and cross-border transformations



- **Case law of ECJ**

- **SEVIC (2005)**: Cross-border merger covered by Art. 49, 54 TFEU
- **Cartesio (2008)**: State of residence can prevent transfer of seat if original legal form is maintained, but must allow conversion into a legal form of the state of immigration
- **Vale (2012)**: Freedom of establishment can also be invoked for cross-border conversions vis-à-vis state of residence (if rules apply exclusively for domestic conversions)
- **Polbud (2017)**: Cross-border change of legal form is also covered in case of transfer of registered office while maintaining place of residence
- **Edil Work (2024)**: Art. 49, 54 TFEU precludes MS legislation which provides generally for its national law to apply to the acts of management of a company established in another MS but carrying on the main part of its activities in the first MS.

=> Freedom of establishment covers switching legal forms cross-border

Freedom of establishment and cross-border transformations

- **General exclusion of conversions compatible with Art. 49, 54 TFEU?**
 - ECJ decisions refer to situations where domestic conversions were possible
 - No discrimination of cross-border conversions
 - But: Two elements of freedom of establishment
 - Equivalence
 - Effectiveness

Freedom of establishment and cross-border transformations

- General exclusion of conversions compatible with Art. 49, 54 TFEU?
- Question: Does effectiveness imply a comprehensive freedom to choose the legal form?
 - (-) cf. foundations
 - (-) regulatory autonomy of Member States
 - (-) wording of Art. 49 para. 2 TFEU

Article 49 — (ex Article 43 TEC)

Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 54, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital.

Freedom of establishment and cross-border transformations

- General exclusion of conversions compatible with Art. 49, 54 TFEU?
- Question: Does effectiveness imply a comprehensive freedom to choose the legal form?
- Existence of (more limited) asset locks in other European company laws

Legal system	Name of the Company form	Distribution of profits	Consequence of conversion and liquidation
Denmark	registrerede socialekonomiske virksomheder ²⁴	35% of the profits may be distributed	In the event of liquidation, only 35% of the remaining proceeds may be paid out to the shareholders.
France	entreprise solidaire d'utilité sociale Loi No. 2014-856 du 31 juillet 2014 relative à l'économie sociale et solidaire ²⁵ ESS Not a legal form in its own right, but a special regulatory regime that can be adopted by different types of companies and that has certain effects on their financial constitution	50% of the profits may be distributed	Conversion possible, but then just as in the case of dissolution: assets go to another social economy organisation Art. 1 No. 3 (b)
Luxembourg	société d'impact sociétal ²⁶ Loi du 12 décembre 2016 portant création des sociétés d'impact sociétal et modifiant ²⁷	50% of the profits may be distributed At least 50% impact shares without profit participation rights	In case of conversion liquidation, assets must be transferred to social economy company or organisation with comparable good purpose Art. 11 (2)
Malta	social enterprise company ²⁸ apparently not yet in force	10% of the profits may be distributed	in the event of conversion/dissolution, assets must be transferred to another corresponding company (Art. 10 (a)-(c)), unless supervisory authority allows otherwise
Romania	întreprinderi sociale Lege No. 219 din 23 iulie 2015 privind economia socială ²⁹	10% of the profit may be distributed	In case of conversion/liquidation, assets must be transferred to another social enterprise or social economy organisation Art. 8 (4) (e)
UK (although no longer a member state)	community interest company Companies (Audit, Investigations and Community Enterprise) Act 2004 ³⁰	35% of the profits may be distributed	Conversion not possible, liquidation possible, but then only contribution may be demanded out, the rest goes to another social enterprise CiC Regulation 2005, ref. 23

Freedom of establishment and cross-border transformations

- **General exclusion of conversions compatible with Art. 49, 54 TFEU?**
- **Question: Does effectiveness imply a comprehensive freedom to choose the legal form?**
- **Existence of (more limited) asset locks in other European company laws**
 - Question: Any cases of cross-border conversions?
 - Difference: no limitation to public benefit purposes (common good)
 - But: no necessary link between asset lock and public benefit purpose

Freedom of establishment and cross-border transformations

- **General exclusion of conversions compatible with Art. 49, 54 TFEU?**
- **Question: Does effectiveness imply a comprehensive freedom to choose the legal form?**
- **Existence of (more limited) asset locks in other European company laws**
- **Scope of application**
 - Companies or firms within the meaning of Art. 54 para. 2 TFEU
 - “save for those which are non-profit-making”: referring to profits at company or at shareholder level?
 - Outside of the scope of application?

Article 54 — (ex Article 48 TEC)

Companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Union shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States.

‘Companies or firms’ means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, **save for those which are non-profit-making.**

Freedom of establishment and cross-border transformations

- General exclusion of conversions compatible with Art. 49, 54 TFEU?
- Question: Does effectiveness imply a comprehensive freedom to choose the legal form?
- Existence of (more limited) asset locks in other European company laws
- Scope of application
- Lack of “parallel” legal forms
 - Freedom of establishment does not imply freedom to switch entirely between legal forms
 - Legal form unique due to asset lock (different if special form of GmbH?)

Freedom of establishment and cross-border transformations

- **Justification of exclusion of cross-border conversions: General interests**
 - Reasons in ECJ case law
 - protection of creditors, minority shareholders and employees, tax interests of treasury, environmental protection and solvency of market participants
 - but not “purely” economic reasons
 - Regulatory goals of Ges. m. geb. Verm.
 - “Purpose” of corporations
 - Stakeholder interests
 - Sustainable economy
 - Avoiding greenwashing
 - Compliance with EU initiatives for sustainable economy
 - But: not limited to pre-defined public benefit => Does that matter?

Freedom of establishment and cross-border transformations

- **Justification of exclusion of cross-border conversions: Suitability and necessity of asset lock**
 - Necessity of asset lock for sustainable economy?
 - (-) other “sustainable” corporate forms do without asset lock (ex: benefit corporation)
 - But: discretion of national lawmakers
 - Effects difficult if not impossible to foresee

Thank you for the attention



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