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Abstract

In an increasingly competitive world, the European Union is facing a pivotal moment for its political and economic development. To safeguard and enhance its wealth, the EU must strengthen its single market, which remains fragmented and therefore highly ineffective. In this context, recent academic and policy studies have revived interest in the establishment of a so-called “28th regime”, conceived as an optional European legal framework operating alongside the twenty-seven national regimes. This regime would be voluntarily adopted by companies and economic operators engaged in cross-border activities, particularly in large-scale cross-border projects that require EU-level procedures, thereby bypassing fragmented local regulatory frameworks.

The purpose of this study is to identify the most suitable pathways for implementing such a legal tool. This paper analyses barriers to the internal market, evaluates EU tools for cross-border activities and the potential of the *European cross-border association*, and compares foreign harmonization models to define the potential scope of a European optional business code.

Finally, the research evaluates the appropriateness of enhanced cooperation as a legal foundation for the implementation of the 28th regime, taking into account its institutional framework and political feasibility. The study concludes that enhanced cooperation, understood as an instrument of last resort, could facilitate the creation of the 28th regime if alternative ways prove unfeasible. However, the effectiveness of the 28th regime depends not only on its legal design, but also on a shared political consensus capable of reconciling innovation with legal certainty. Its viability ultimately rests on a unified commitment to an integration model that balances flexibility with uniformity, while remaining consistent with EU institutional oversight and the interpretive authority of the Court of Justice.

Author

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Keywords

28th Regime, Enhanced Cooperation, European Business Code, European Cross-border Association (ECBA), Organization for the Harmonization of Business Law in Africa (OHADA), Uniform Commercial Code (UCC), Handelsgesetzbuch (HGB).

The Tailor-Made Implementation of the 28th Regime

Introduction[1]

In the last few decades, important steps have been taken to integrate Europe. Nonetheless, despite numerous attempts, the European Union's internal market is still fragmented, especially in sectors where the EU cannot exercise exclusive competence.[2]

To address this situation, the notion of the 28th regime, (re-)brought[3] to prominence by the 2024 Report *Much More than a Market* authored by Enrico Letta[4], the 2024 Report 'The future of European competitiveness' developed by Mario Draghi[5], the 2025 European Commission, 'A competitiveness compass for the EU'[6] and the Draft Report with recommendations to the Commission on the 28th Regime: a new legal framework for innovative companies of the European Parliament elaborated by the Committee on Legal Affairs[7], represents a potentially transformative proposal for the legal and institutional future of the European Union's internal market. It concerns the creation of an optional legal framework, complementary to the twenty-seven existing national regimes, that could be adopted voluntarily by companies and economic operators engaged in cross-border activities, in particular in cross-border projects whose size requires an EU procedure, bypassing those at the local level (e.g., large offshore wind in the North Sea)[8]. In order to achieve this, the creation of the European Business Code (EBC), or *Code européen des affaires*,[9] would have particular relevance. It could be the legal basis of a corporate form, the European Start-Up and Scale-Up company (ESSU)[10], and of the *Société Européenne*

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[1] The author is grateful to anks to Mr. Alessandro Sorpresa for his initial contribution to the drafting of this research.

[2] Centre for European Policy Studies and others, *Establishing the 28th regime in Europe: a unified legal framework to support growth and business* (Publication Office of the European Union 2025) 1.

[3] Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law COM(2011) 635 final [2011] OJ C 352/1. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52011PC0635 (Accessed: 18 June 2025).
Among other comments, see Giesela Rühl, "The Common European Sales Law: 28th regime, 2nd Regime or 1st Regime?" (2012) 19(1) Maastricht Journal of European and Comparative Law 148–163. Available at: https://doi.org/10.1177/1023263X1201900112 (Accessed: 18 June 2025).

[4] Enrico Letta, *Much More Than a Market: High-Level Report on the future of the Single Market* (Report to the European Council 2024) 12. Available at: https://www.consilium.europa.eu/media/ny3j24sm/much-more-than-a-market-report-by-enrico-letta.pdf (Accessed: 27 November 2025).

[5] Mario Draghi, *Competitiveness: The key to Europe's future* (Report to the European Commission 2024). Available at: https://commission.europa.eu/topics/competitiveness/draghi-report_en (Accessed: 27 November 2025).

[6] European Commission, *Competitiveness Compass* (Communication 2025). Available at: https://commission.europa.eu/topics/competitiveness/competitiveness-compass_en (Accessed: 27 November 2025).

[7] See: https://oeil.europarl.europa.eu/oeil/en/procedure-file?reference=2025/2079(INL)#section6. (Accessed: 6 December 2025).

[8] Mario Draghi, *Competitiveness: The key to Europe's future* (Report to the European Commission 2024) 33.

[9] The European Business Code (*Code européen des affaires*) is an ambitious legislative project aimed at unifying and harmonizing business law (*droit des affaires*) within the European Union. The goal is to unify corporate, commercial and related domains of law, helping businesses of all sizes to easily operate across borders. See: Rémy Cabrillac, "Un Code européen des affaires, une chance pour la construction européenne" (2019) 21 *Recueil Dalloz* 1; Matthias Lehmann, "EU Law-Making 2.0: The Prospect of a European Business Code" (2020) 28 *European Review of Private Law* 73 and Branislav Dudić, Jelena Premović, "Fourth International Scientific Conference "Challenges of Modern Economy and Society through the Prism of Green Economy and Sustainable Development" – CESGED 2024" (Faculty of Economics and Engineering Management – FIMEK: Educational and Business Center for Development of Human Resources, Management and Sustainable Development, 2024).

[10] The primary goal of the ESSU framework is to support small and medium enterprises (SMEs), start-ups, and scale-ups across the European Union. It aims to address the regulatory diversity and complexity across Member States which currently hinder the pan-European financing and scaling of these innovative companies. In terms of legal structure, the ESSU is proposed as a limited liability company that should generally not be listed on the stock market. It is intended to be a simplified, digitalised, understandable, and user-friendly regulatory environment. See: European Parliament, Committee on Legal Affairs, "Draft Report with recommendations to the Commission on the 28th Regime: a new legal framework for innovative companies (2025/2079(INL))" (PE773.199, 30 June 2025); European Parliament, Committee on Legal Affairs, 'Amendments 1–344 to the Draft Report on the 28th Regime: a new legal framework for innovative companies (2025/2079(INL))' (PE776.972v01-00, 12 September 2025). Available at: https://oeil.europarl.europa.eu/oeil/en/procedure-file?reference=2025/2079(INL)#section6 (Accessed: 28 November 2025).

Simplifiée (SES)[11], which could ease the development of innovation, services, and digital technologies. Specifically, this Code is intended to have direct application in areas that fall within the exclusive competences of the European Union. In these fields, the Code would replace other national provisions to enhance the efficiency of cross-border business operations, reducing fragmentation. By contrast, in matters where EU competence is either shared or absent, the Code would operate as a third way: an optional and flexible path to integration for cross-border activities, coexisting with, but not replacing, national legal systems. From a methodological perspective, this 28th regime avoids the traditional instruments of mandatory harmonization, which often lead to the lowest common denominator effect. Crucially, the regime is structured to be voluntary for business operators (firms or individuals), allowing them to opt into this EU framework instead of their national legal regime. However, for Member States, its availability must be mandatory. This approach aligns activities more closely with Single Market objectives while preserving national legal autonomy[12].

The EBC, also through the establishment of ESSU and SES, might target general commercial law, law of enterprises (both regarding their organization and their transactions among themselves), corporate law as a fundamental layer of the proposed 28th regime, market law (mainly covering competition issues), e-commerce law, securities law, enforcement law, law of businesses in difficulty: insolvency law, tax law, banking law, insurance law, financial markets law, intellectual property law and social law (meaning mainly labour law or employment law)[13].

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[11] The *Société Européenne Simplifiée* (SES), or Simplified European Company (SEC), is a proposed statute developed by the Association Henri Capitant (an international group of experts under the auspices of the French lawyers) to revitalize the concept of a European Private Company (EPC) in a modified format. The primary objective of this legal status, whose acronym is inspired by the French *Société par Actions Simplifiée* (SAS), is to integrate existing supranational company forms and establish a uniform, accessible, and flexible legal model specifically for small and medium-sized enterprises (SMEs). The SES is designed to counter the regulatory fragmentation and lack of legal uniformity that currently impede the cross-border operations of SMEs, with the goal of fostering access to finance and enhancing the readability and transparency of the corporate structure for investors. This initiative seeks to deliver substantial cost and efficiency benefits for corporate groups managing subsidiaries across different Member States. The SES is defined as a legal entity with legal capacity, flexible governance structure and with one or more shareholders; a limited company in which shareholders are not liable for the company's liabilities and a private company whose shares are not tradable on a stock exchange. A distinguishing feature is the minimum nominal capital, which is significantly lower (such as the EUR 12.000 proposed in one draft, compared to the EUR 120.000 required for the *Societas Europaea* or SE). Furthermore, the SES does not require a compulsory cross-border element for its formation, and its statute is broadly uniform, minimizing references to national company law.
See: Dirk A. Verse, "A New Start for the European Private Company: The Draft Statute for a "Société Européenne Simplifiée" (SES)" (2022) 4 ECFR 654; Mario Draghi, *Competitiveness: The key to Europe's future* (Report to the European Commission 2024); Iris Barsan, "A simplified European Company – A Comparative and Prospective Approach, Actes du Colloque" (2023) 4 RTDF 10; Association Henri Capitant, Projet de code européen des affaires, Avant-projet relatif à la Société Européenne Simplifiée (SES) (15 December 2020) and Haut Comité Juridique de la Place Financière de Paris, *Rapport sur la société européenne simplifie* (2021).

[12] Enrico Letta, *Much More Than a Market: High-Level Report on the future of the Single Market* (Report to the European Council 2024) 108. https://www.consilium.europa.eu/media/ny3j24sm/much-more-than-a-market-report-by-enrico-letta.pdf (Accessed: 18 June 2025); Apostolos Thomadakis, Judith Arnal, Pol Diestre, José Salcedo Jimenez and J. Scott Marcus, *Establishing the 28th Regime in Europe: A Unified Legal Framework to Support Growth and Business* (QE-01-25-038-EN-N, EESC Study, 2025) 5 9 23;

[13] Enrico Letta, *Much More Than a Market: High-Level Report on the future of the Single Market* (Report to the European Council 2024) 108; Matthias Lehmann, "EU Law-Making 2.0: The Prospect of a European Business Code" (2020) European Review of Private Law 78; Centre for European Policy Studies and others, *Establishing the 28th regime in Europe: a unified legal framework to support growth and business* (Publication Office of the European Union 2025) 28; Rémy Cabrillac, "Un Code européen des affaires, une chance pour la construction européenne" (2019) 21 *Recueil Dalloz* 1 6; Matthias Lehmann, "EU Law-Making 2.0: The Prospect of a European Business Code" (2020) European Review of Private Law 101.

Recognizing its potential benefits, after failed attempts in 2008[14], 2011[15], and 2014[16], the European Commission has actively explored the codification of EU business law, finding widespread support for the concept among Member States. A cohesive code of business law could significantly enhance both competitiveness and market attractiveness, as evidenced by several key foreign examples.

Regarding its structure, the analysis develops in four sections. First, it examines the persistent legal and administrative barriers in trade and services that fragment the internal market. Second, it further examines the study of the current EU instruments intended to support cross-border business activities, highlighting their limitations, and it analyses the potential of the new European cross-border association (ECBA). Third, the article turns to a comparative analysis of three major foreign approaches to business law harmonization, Organization for the Harmonization of Business Law in Africa (OHADA), the Uniform Commercial Code (UCC), and the *Handelsgesetzbuch* (HGB), to draw insights relevant for a possible European optional business code. Finally, it explores the appropriateness of enhanced cooperation as a foundation for the 28th regime's implementation, considering its institutional scope and political feasibility.

1 Legal and administrative obstacles in the trade and services sector: Contract law and insolvency procedures

The need for harmonization is particularly evident in cross-border cooperation dynamics, and the significant cost of the EU's fragmented internal market is well documented[17]. Barriers related to contract law significantly contribute to this trend[18]. While there are additional barriers to cross-border

[14] Commission, "Proposal for a Council Regulation of 25 June 2008 on the Statute for a European Private Company" (Proposal) COM(2008) 396 final. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52008PC0396 (Accessed: 7 December 2025). In 2008, the European Commission proposed the European Private Company (SPE)—a simplified, optional legal form intended to boost SME cross-border operations. The SPE was designed to be a flexible, low-cost national alternative, featuring a minimal capital requirement, digital registration, and the freedom to transfer headquarters within the EU without liquidation. However, despite being specifically tailored to reduce entry barriers for SMEs and requiring no cross-border formation condition (unlike the SE), the SPE met immediate and persistent political resistance. Objections primarily came from Member States with strong codetermination laws (such as Germany), which raised alarms about the lack of worker participation safeguards. Furthermore, trade unions warned that the SPE could facilitate social dumping and the creation of 'letterbox companies', while several governments cited concerns over tax arbitrage and legal uncertainty due to insufficient substance requirements.

[15] Commission, "Proposal for a Regulation on a Common European Sales Law" (Proposal) COM(2011) 635 final 28. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2011:635:FIN (Accessed: 28 November 2025). The Common European Sales Law (CESL), proposed in 2011, was an ambitious legislative effort to create an optional, fully harmonized contract law covering the entire lifecycle of cross-border B2C and SME B2B sales. The framework, consisting of 186 articles, was meant to coexist with national laws, applying only when chosen by the parties. Although the European Parliament adopted it in 2014, the CESL failed to gain approval in the Council. Member States rejected the proposal on grounds of subsidiarity, arguing it created an unjustified parallel legal order. It even triggered a "yellow card" procedure from national parliaments questioning its necessity. The proposal was withdrawn in 2020. The CESL's failure highlights the institutional challenges of adopting optional EU regimes when stakeholders are divided, the legal basis is disputed, and the scope is overreaching.

[16] Commission, "Proposal for a Directive of the European Parliament and of the Council on single-member private limited liability companies" (Proposal) COM(2014) 212 final. Available at: EUR-Lex - 52014PC0212 - EN - EUR-Lex (Accessed: 7 December 2025). This Commission proposal was an attempt to salvage the European Private Company (SPE) project by restricting its scope and reapplying it with a new name: SUP (*Societas Unius Personae*). The SUP was conceived to reduce start-up and operating costs for single-member companies through harmonized EU rules. Key provisions included minimal capital, online registration using a standardized template, and the freedom to separate the registered office from the central administration. Creditor safeguards were ensured by placing a distribution control duty on the directors and the single member. This proposal, which would repeal Directive 2009/102/EC and amend Regulation 1024/2012 to use the IMI system, was part of a broader effort, consistent with the 2009 Stockholm Programme, to improve legal clarity for EU companies operating across borders.

[17] In 2024 the International Monetary Fund estimated that internal trade barriers are equivalent to tariffs of 45% for goods and a massive 110% for services, far exceeding external trade tariffs. This type of obstacle discourages traders, mainly small and medium-sized enterprises (SMEs), from accessing cross-border trade or expanding their business to new Member States' markets. Moreover, consumers are hindered from buying products sold by traders in other EU Member States. In 2019 it was assessed that, without removing the trade frictions in the EU, Europe will continue to lose around 10% of potential GDP. See: Centre for European Policy Studies and others, *Establishing the 28th regime in Europe: a unified legal framework to support growth and business* (Publication Office of the European Union 2025) 1; Jan in 't Veld, "Quantifying the Economic Effects of the Single Market in a Structural Macromodel" (Discussion Paper Series, n. 94, European Commission 2019) 12.

[18] Commission, "Proposal for a Regulation on a Common European Sales Law" (Proposal) COM(2011) 635 final OJ C 352/1 2. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2011:635:FIN (Accessed: 18 June 2025).

trade, including tax regulations, administrative requirements, delivery difficulties, and language and cultural differences, traders consistently rank contract-law-related obstacles among the top barriers[19].

Compared with domestic trade, cross-border trade is highly complex and expensive for traders. They must adapt their economic activities to the varying national contract laws that may apply in cross-border dealings, for both business-to-consumer (B2C) and business-to-business (B2B) transactions. Doing business in cross-border situations entails additional costs for economic actors that include research difficulties into the applicable foreign contract law provisions, the obtaining of reliable legal advice, the negotiation of the applicable law in business-to-business transactions and the adaptation of the contracts to the requirements of the consumer law in business-to-consumer transactions.

In cross-border transactions between a business and a consumer, the incompatibility between compulsory national consumer protection rules makes the contract law expensive, because of additional transaction costs, and creates extra legal obstacles. In this regard, Article 6 of Regulation (EC) No 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I) mandates that whenever a business directs its activities towards consumers in a different Member State, it must adhere to that specific Member State's contract law[20].

Although some EU consumer laws have been harmonized, significant differences still exist between Member States, generating additional costs for cross-border trade. For e-commerce businesses, this requires customizing websites to comply with national legal requirements, while in cross-border business-to-business transactions adapting to and applying foreign law entails significant economic costs. These costs are particularly burdensome for SMEs, which often lack bargaining power and must adopt their partner's legal framework, bearing the expenses of understanding and complying with the applicable foreign law. Even agreeing on the governing law between two SMEs can represent a considerable hurdle to international trade. As firms expand their exports to more EU Member States, these transaction costs increase proportionally, becoming disproportionate to the value of the transaction and representing a larger share of SMEs' smaller turnovers. Differences in contract law therefore constitute a significant barrier to trade, especially where legal systems differ substantially, as trade tends to be higher between countries with similar legal backgrounds[21]. Consequently, the disparities in contract law, and the extra costs and complexity they generate, deter many businesses, particularly SMEs, from expanding into other EU markets. This not only limits competition within the internal market but also leads to an estimated annual loss of tens of billions of Euros in trade[22].

Concurrently, this reduced cross-border trade has a negative ripple effect on European consumers. It leads to fewer imports and less competition among traders, which can result in consumers having a narrower range of products and paying higher prices. Regarding customers, despite the potential benefits of cross-border shopping, most European consumers buy only domestically because differences in national laws often leave them uncertain about their rights in cross-border transactions[23].

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[19] For instance, 35% of respondents found it difficult to ascertain foreign contract law provisions, 31% struggled to obtain legal advice on it, and 30% faced challenges agreeing on which foreign contract law should apply. See: Commission, "Eurobarometer 320 on European Contract Law in Business-to-Business Transactions" (2011) 6 15. Available at: https://europa.eu/eurobarometer/surveys/detail/965 (Accessed: 18 June 2025), and Commission, "Eurobarometer 321 on European Contract Law in Consumer Transactions" (2011) 1. Available at: https://europa.eu/eurobarometer/surveys/detail/964 (Accessed: 18 June 2025).

[20] The consequence is that in cases where another applicable law has been agreed by the parties and where the mandatory consumer protection provisions of the Member State of the consumer provide more protection, these mandatory rules of the consumer's law have to be complied. Traders must research the consumer protection laws in a customer's home country beforehand. If those laws offer stronger protection than their own, traders need to make sure their contracts meet those higher standards.

[21] Alessandro Turrini and Tanguy Van Ypersele, "Traders, courts and the border effect puzzle" (2010) 40 Regional Science and Urban Economics 82: "Analysing international trade across OECD countries we show that controlling for countries specific factors, distance, the presence of common border and common language (…), similar legal systems have a significant impact on trade (…). If two countries share common origins for their legal system, on average they exhibit trade flows 40% larger".

[22] Commission, "Proposal for a Regulation on a Common European Sales Law" (Proposal) COM(2011) 635 final OJ C 352/1 3. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2011:635:FIN (Accessed: 18 June 2025).

[23] Commission, "Proposal for a Regulation on a Common European Sales Law" (Proposal) COM(2011) 635 final OJ C 352/1. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2011:635:FIN (Accessed: 18 June 2025).

In parallel, the lack of harmonized insolvency regimes significantly hinders both the free movement of capital and greater integration of capital markets within the EU, a concern jointly highlighted in 2015 by the European Parliament, the Council, the Commission, and the European Central Bank (ECB) as crucial for a "well-functioning" Capital Markets Union (CMU).[24] In 2019, the International Monetary Fund (IMF) highlighted that insolvency practices are one of "the three key barriers to greater capital market integration in Europe", alongside transparency and regulatory quality. The ECB declared that "more efficient and harmonized insolvency laws [alongside other measures] can improve certainty for investors, reduce costs and facilitate cross-border investments, while also making risk capital more attractive and accessible to companies"[25]. Nevertheless, the Member States still have different insolvency rules, which lead to different levels of efficiency in terms of the time it takes to liquidate an enterprise and the value that could be recovered. Therefore, some EU countries are characterized by lengthy insolvency procedures and a low average recovery value in liquidation cases. The absence of a unified approach creates legal ambiguity in insolvency proceedings, increasing information and learning costs for cross-border creditors compared to domestic ones. Low returns, lengthy procedures, and high costs in insolvency cases are key factors investors and creditors consider when determining the risk premium. An inefficient insolvency system leads to a higher risk premium, which increases a company's cost of capital and, in high-risk cases, may deter investors from lending altogether, thereby restricting access to affordable financing for growth. Differing insolvency rules across the EU pose a significant challenge for cross-border investors, who may need to navigate up to 27 distinct regimes when investing outside their home country. This creates an uneven playing field, as similar investments are more attractive in Member States with more efficient insolvency systems. As a result, capital movements across borders are hindered, affecting the proper functioning of the EU's single capital market. Companies in Member States with stronger insolvency frameworks are also more likely to obtain cheaper funding, gaining a competitive advantage. These divergent rules deter investors, particularly those with limited resources, from investing in less familiar legal systems, thereby reducing cross-border investment and undermining the depth and effectiveness of the Capital Markets Union (CMU).

Recent economic developments also demonstrate that the persistence of less favorable ratings in certain high-debt EU economies underscores their enduring vulnerabilities[26]. If such shocks occur, more efficient and better-aligned insolvency rules in the EU would boost its capacity to absorb them. These rules would also help reduce the negative impact and costs for investors from disorderly business wind-downs.

As such, the lack of alignment in insolvency laws across the EU is holding back cross-border investment and business relationships. To truly unlock this potential, the EU needs to step in and significantly reduce the fragmentation of these insolvency rules[27].

2 Limits of the *Societas Europaea* (SE), European Cooperative Society (SCE), European Grouping of Territorial Cooperation

[24] Commission, "Five Presidents' Report: Completing Europe's Economic and Monetary Union" (Report). Available at: https://commission.europa.eu/publications/five-presidents-report-completing-europes-economic-and-monetary-union_en (Accessed: 18 June 2025) and Parliament, "Procedure Document Summary" 1396683. Available at: https://oeil.secure.europarl.europa.eu/oeil/en/procedure-document-summary/pdf?id=1396683 (Accessed: 18 June 2025).

[25] ECB, Financial integration in Europe (ECB 2018). Available at: https://www.ecb.europa.eu/pub/pdf/fie/ecb.financialintegrationineurope201805.en.pdf (Accessed: 18 June 2025) and ECB, Financial integration in Europe (ECB 2022). Available at: https://www.ecb.europa.eu/pub/pdf/fie/ecb.fie202204~4c4f5f572f.en.pdf (Accessed: 18 June 2025).

[26] European Commission, "Debt Sustainability Monitor 2024" (European Commission 2024) 28. Available at: https://economy-finance.ec.europa.eu/publications/debt-sustainability-monitor-2024_en#description (Accessed: 18 June 2025).

[27] Commission, "Proposal for a Directive harmonising certain aspects of insolvency law" COM (2022) 702 final. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52022PC0702 (Accessed: 18 June 2025).

(EGTC) and Cross-Border Facilitation Tool (CBFT) and the potentiality of the drafts European Cross-Border Association (ECBA)

One of the current legal structures available to companies engaging in cross-border business within the EU is the European Company, also known as the *Societas Europaea* (SE). The SE regulation entered into force in October 2004. Since then, companies may be established within the territory of the Community (now the Union) in the form of a European public limited-liability company (*Societas Europaea* or SE) in accordance with the conditions and procedures laid down by the applicable legislation[28]. Nevertheless, from the very beginning, this possibility seemed not to be suitable to smaller firms, especially considering that the subscribed capital "shall not be less than EUR 120.000"[29]. In addition to that, there has to be a connection with (at least) two Member States[30]. This means that this tool does not refer to strictly domestic operations nor to cases in which the law of a third country is applied[31].

Moreover, despite some advantages – for example, the provision allowing the transfer of a company's registered office from one Member State to another without the need to re-establish or dissolve the company - the the deferment to national law and the perception also of the procedural complexity and costs of the instrument raise some doubts in terms of practicability and variation in the application of these provisions within a legal context that varies from country to country.

An analysis of various surveys[32] reveals a prevailing tendency to opt for local corporate forms, which are more familiar to practitioners, with a few exceptions, notably in countries like Germany. This seems to diverge from the purpose outlined in Consideration 6 of the regulation, which states that it "is essential to ensure as far as possible that the economic unit and the legal unit of business in the Community coincide".

The lack of a well-established supranational corporate culture in cross-border operations is similarly reflected in the context of the European Cooperative Society (SCE)[33], which can be established under the conditions and in the manner laid down in Regulation (EC) n. 1435/2003[34] and in the supplementing Directive n. 2003/72/EC[35]. Both acts were founded on Article 308 TEC, as was the case with the *Societas Europaea*[36]. Moreover, the European Cooperative Society, whose Statute was first submitted in 1992

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[28] Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE) OJ L 294/1, art 1. Available at: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32001R2157 (Accessed: 18 June 2025).

[29] Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE) OJ L 294/1, art 4. Available at: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32001R2157 (Accessed: 18 June 2025).

[30] Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE) OJ L 294/1, art 2. Available at: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32001R2157 (Accessed: 18 June 2025).

[31] Jürgen Basedow, *The Law of Open Societies: Private Ordering and Public Regulation in the Conflict of Laws* (2nd ed, Brill 2015) 289–290.

[32] Among others, see Commission, "Report from the Commission to the European Parliament and the Council The application of Council Regulation 2157/2001 of 8 October 2001 on the Statute for a European Company (SE)" COM (2010) 676 final. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52010DC0676 (Accessed: 18 June 2025).

[33] For the other three proposals, then withdrawn by the Commission, the European Private Company (*Societas Privata Europea*, SPE) and the European Foundation (*Fondatio Europea*, FE), see: 1) Commission, "Proposal for a Council Regulation on the Statute for a European private company" COM (2008) 396/3. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52008PC0396 (Accessed: 18 June 2025); 2) Commission, "Proposal for a Council Regulation on the Statute for a European Foundation (FE)" COM (2012) 35 final. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52012PC0035 (Accessed: 18 June 2025); 3) Commission, "Proposal for a Directive of the European Parliament and of the Council on single-member private limited liability companies" COM (2014) 212 final. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52014PC0212 (Accessed: 18 June 2025).
See also Commission, "Commission Work Programme 2015: A New Start" (Communication) COM (2014) 910 final, Annex 2, item 61.

[34] Council Regulation (EC) No 1435/2003 on the Statute for a European Cooperative Society (SCE) OJ L207/. Available at: https://eur-lex.europa.eu/eli/reg/2003/1435/oj/eng (Accessed: 18 June 2025).

[35] Council Directive 2003/72/EC of 22 July 2003 supplementing the Statute for a European Cooperative Society with regard to the involvement of employees OJ L207/25. Available at: https://eur-lex.europa.eu/eli/dir/2003/72/oj/eng (Accessed: 18 June 2025).

[36] See William Bull, *Optional Instruments of the European Union. A Definitional, Normative and Explanatory Study* (Ius Commune: European and Comparative Law Series No 149, Intersentia 2016) 57ff.

and came into force in August 2006, also faced some opposition, mostly concerning the mechanisms guaranteeing employee participation in the decision-making process[37].

As such, the SCE can also be seen as an instrument positioned in the ongoing dynamic process aimed at fostering cross-border activities within the EU context, driven by shared needs and common objectives. The SCE was designed to address the gap left by the SE, which "is not an instrument which is suited to the specific features of cooperatives"[38].

Similarly, as specified in the SE Regulation, the SCE Regulation also required the presence of a cross-border element within the EU. Furthermore, pursuant to Article 8, which disciplines the applicable law, "in the case of matters not regulated by this Regulation or, where matters are partly regulated by it, of those aspects not covered by it, [an SCE shall be governed] by: (i) the laws adopted by Member States in the implementation of Community measures relating specifically to SCEs; (ii) the laws of Member States which would apply to a cooperative formed in accordance with the law of the Member State in which the SCE has its registered office; (iii) the provisions of its statutes, in the same way as for a cooperative formed in accordance with the law of the Member State in which the SCE has its registered office"[39]. This general provision, together with additional specific clauses (such as those concerning taxation) reinforces the idea that the SCE does not have a single uniform structure but rather varies across the different Member States. In addition, in the case of the SCE, the registered office can also be transferred to another Member State.

According to the Report produced by the Commission[40], the low number of SCE reflects the difficulties encountered in implementing this instrument designed to overcome the national borders. Among the challenges are the practical realities of cooperatives across Member States, including the requirement for a minimum subscribed capital of EUR 30.000, the legislative and administrative complexities involved, and the comparatively lower recognition of the SCE versus well-established national legal forms, which do not request additional burdens on the daily management of business operators.

In this context, another EU legal instrument available for firms to facilitate their economic activities abroad is the *European Grouping of Territorial Cooperation* (EGTC). It was created by the European Union in 2006 referring[41] to the Karlsruhe Agreement[42] and based on Article 175 TFEU[43], in order to improve the management of public funds[44]. According to Regulation (EC) n. 1082/2006, later amended by Regulation (EU) n. 1302/2013, the final goal of this legal tool is to facilitate and promote territorial

[37] Holger Fleischer, "Supranational Corporate Forms in the European Union: Prolegomena to a Theory on Supranational Forms of Association" (2010) Common Law Review 1677.

[38] Council Regulation (EC) No 1435/2003 on the Statute for a European Cooperative Society (SCE) OJ L207/1, para 4.

[39] Regarding the applicable law for the SE, see Article 9 of the SE Regulation.

[40] Commission, "The application of Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE)" (Report) COM (2012) 72 final.

[41] Francesco Palermo, "Il GECT come nuovo strumento di cooperazione transfrontaliera: l'Euregio Tirolo-Alto Adige-Trentino" in Francesco Palermo, Walter Obwexer and Esther Happacher (eds), *I 40 anni del secondo Statuto di autonomia. L'autonomia speciale della Provincia autonoma di Bolzano nel contesto dell'integrazione europea* (Cedam 2014) 183.

[42] Swiss Federal Department of Foreign Affairs, "Switzerland's European policy" (Accessed: 18 June 2025): "In 1996, the Federal Council signed with the governments of Germany, France and Luxembourg the Karlsruhe Agreement on Transboundary Cooperation between local communities and local bodies. To date, the cantons of Solothurn, Basel-Stadt, Basel-Landschaft, Aargau, Jura, Schaffhausen, Bern, Neuchâtel, Vaud, Geneva and Valais are parties to the agreement signed on their behalf. It contains provisions on the conclusion of cross-border cooperation agreements and on the creation of bodies known as local groupings".

[43] Piedmont Regional Council https://www.cr.piemonte.it/dwd/organismi/cons_euro/schede_UE/06_coesione_economica_sociale_e_territoriale-v2-1.pdf (Accessed: 18 June 2025). See also: Article 175 TFEU: "Member States shall conduct their economic policies and shall coordinate them in such a way as, in addition, to attain the objectives set out in Article 174 (EU overall harmonious development). The formulation and implementation of the Union's policies and actions and the implementation of the internal market shall take into account the objectives set out in Article 174 and shall contribute to their achievement. (...) If specific actions prove necessary outside the Funds and without prejudice to the measures decided upon within the framework of the other Union policies, such actions may be adopted by the European Parliament and the Council acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions".

[44] S Zillmer and M Toptsidou, "Potential and Limits of the EGTC Instrument for Enhancing Integration Across Borders" (Spatial Foresight Brief No 5, Spatial Foresight 2014) 6, Jens Woelk, "La Cooperazione Transfrontaliera Regionale nell'UE: il GECT Euregio Tirolo-Alto Adige-Trentino" in W Obwexer and E Pfanzelter (eds), *70 Anni Accordo di Parigi* (Nomos Verlagsgesellschaft 2020) 238-239.

cooperation, in particular, between its members, including one or more of the cross-border, transnational and interregional strands of cooperation, with the aim of strengthening economic, social and territorial cohesion in the EU[45]. An EGTC could be established by at least two members, one must be based in the European Union, that may be: Member States or authorities at national level, regional and local authorities, bodies governed by public law and enterprises that manage services of general economic interest[46]. EGTC must have a registered office in a Member State under whose law at least one of its members is established. Its acts are governed by its founding Regulation, a Convention, and, for matters not fully or partly regulated by the Regulation, by the national law of the Member State where the EGTC is registered[47]. Regulation (EC) No 1082/2006 exhibits characteristics more akin to an EU Directive, given its limited scope in regulating the various facets of the European Grouping of Territorial Cooperation. Consequently, EGTCs exhibit significant variation in their types, categorized by their territorial scope, specific purposes, assigned tasks, and funding mechanisms[48].

Like the SE[49] and SCE[50], also this instrument has legal personality, granted by Article 1(3) of the EGTC Regulation. Thanks to this, each EGTC has the power to have its own staff and budget, be responsible for its own debts, launch and participate in tenders, provide public services and manage public infrastructure, conclude contracts, participate in Interreg programs, and be held liable in court[51].

As already argued, an important problem of doing business abroad is the lack of harmonization of different laws affecting trade and services. Presently, the EGTCs' capacity to effectively address this issue is constrained by Article 7, which authorizes EGTCs solely to carry out tasks unanimously delegated by their constituent members and prohibits them from exercising "powers conferred by public law or duties whose object is to safeguard the general interests of the State or of other public authorities, such as police and regulatory powers, justice and foreign policy," thereby precluding them from holding legislative authority[52].

As mentioned, the European institutions realized that the EGTC, along with Interreg programs and so-called *b-solutions* initiatives[53], is not sufficient to resolve some of the administrative and legal obstacles which hamper effective cooperation[54]. A European Parliamentary Research Service study, assessing

[45] European Parliament - EGTCs https://www.europarl.europa.eu/factsheets/en/sheet/94/gruppi-europei-di-cooperazione-territoriale-gect- (Accessed: 18 June 2025). Regulation (EC) No 1082/2006 [2006] OJ L 210/19, art 1.

[46] Regulation (EC) No 1082/2006 [2006] OJ L 210/19, arts 3 and 3a; Luigi D'Ettore, "GECT, Euroregioni e Comunità di lavoro nel quadro della cooperazione territoriale europea" (2018) No 23 Federalismi.it 17–18: "The types of public undertakings are defined in Article 2, paragraph 1, letter (b) of Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport, and postal services sectors, published in the OJEU L 134 of 30.4.2004, pp. 1-113. These undertakings are those on which contracting authorities can exercise, directly or indirectly, a dominant influence by virtue of their ownership, their financial participation therein, or of rules governing the undertakings in question".

[47] Regulation (EC) No 1082/2006 [2006] OJ L 210/19, art 2.

[48] Sabine Zillmer and Maria Toptsidou, "Potential and Limits of the EGTC Instrument for Enhancing Integration across Borders" (2014) 5 Spatial Foresight Brief 4, Gyula Ocskay, "Changing Interpretation of the EGTC Tool" in Gyula Ocskay (ed), *15 Years of the EGTCs: Lessons Learnt and Future Perspectives* (CESCI 2020) 50-54.

[49] Article 1(3) Reg. (CE) No 2157/2001.

[50] Article 1(5) Reg. (CE) No 1435/2003.

[51] Evrard Estelle, "The European Grouping of Territorial Cooperation (EGTC): Towards a Supraregional Scale of Governance in the Greater Region SaarLorLux?" (2016) 3 Geopolitics 2; Eduardo Medeiros, "The EGTC as a Tool for Cross-Border Multi-Level Governance" in Eduardo Medeiros (ed), *15 Years of the EGTCs: Lessons Learnt and Future Perspectives* (CESCI 2020) 149; Jens Woelk, "La Cooperazione Transfrontaliera Regionale nell'UE: il GECT "Euregio Tirolo-Alto Adige-Trentino" in Walter Obwexer and Eva Pfanzelter (eds), *70 Anni Accordo di Parigi* (Nomos Verlagsgesellschaft 2020) 243-244.

[52] Working Group on Innovative Solutions to Cross-Border Obstacles, *Report on Innovative Solutions to Cross-Border Obstacles* (28 June 2017) 3-4. Available at: http://www.espaces-transfrontaliers.org/fileadmin/user_upload/REPORT_20170628_WG_on_Innovative_Solutions_to_Cross-Border_Obstacles.pdf (Accessed: 18 June 2025), European Commission, COMMISSION STAFF WORKING DOCUMENT Accompanying the document COMMUNICATION FROM THE COMMISSION TO THE COUNCIL AND THE EUROPEAN PARLIAMENT on Boosting Growth and Cohesion in EU Border Regions SWD(2017) 307 final 49. Available at: https://eur-lex.europa.eu/legal-content/GA/TXT/?uri=CELEX:52017SC0307 (Accessed: 18 June 2025); J Peyrony, "Should EGTCs have Competences, and not only Tasks? Underlying Visions of Cross-border Integration" in G Ocskay (ed), *15 Years of the EGTCs: Lessons Learnt and Future Perspectives* (CESCI 2020) 229; Amended proposal for a Regulation of the European Parliament and of the Council on a mechanism to resolve legal and administrative obstacles in a cross-border context COM(2023) 790 final 2. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52023PC0790 (Accessed: 18 June 2025).

[53] Available at: https://op.europa.eu/en/publication-detail/-/publication/f5a134d8-8499-11ef-a67d-01aa75ed71a1/language-en (Accessed: 1 July 2025).

[54] Regulation (EU) 2025/925 of the European Parliament and of the Council of 7 May 2025 on a Border Regions' instrument for development and growth (BRIDGEforEU) [2025] OJ L 2025/925 1. Available at: https://eur-lex.europa.eu/eli/reg/2025/925/oj/eng (Accessed: 18 June 2025).

2014-2019 data, revealed that removing cross-border obstacles would significantly benefit NUTS 3 border regions and the EU economy. Specifically, resolving all legal and administrative barriers could boost the EU's Gross Value Added (GVA) by approximately EUR 457 billion annually (3.8% of 2019 total EU GVA). Even resolving just 20% of these obstacles across all border regions would yield an annual GVA benefit of EUR 123 billion (around 1% of 2019 total EU GVA) and create 1 million jobs (roughly 0.5% of total EU employment)[55]. Given such a situation, after ten years of difficult negotiation among the Commission, the Parliament and Member States, the European Commission announced the adoption by the European Parliament of the new BRIDGEforEU Regulation[56] on 6 May 2025. The Regulation introduces the so-called *Cross-Border Facilitation Tool* (CBFT) as part of a new, complementary framework under Union law. The BRIDGEforEU Regulation aims to streamline cross-border cooperation by promoting the creation of Cross-Border Coordination Points in Member States. These points will play a key role in evaluating local requests concerning obstacles and transmitting them to national authorities. If an obstacle is identified, Member States and regions can then utilize the CBFT, a voluntary, standardized procedure designed to address administrative and legal barriers. While all requests need a response, the final decision on whether to resolve an obstacle rests exclusively with the relevant national authorities[57].

As a new initiative, the Cross-Border Facilitation Tool (CBFT) cannot yet be fully assessed. However, this procedure may be complicated and burdensome, and its effectiveness will critically depend on the political will of individual Member States. This suggests that the BRIDGEforEU Regulation may not be fully effective in harmonizing legal and administrative frameworks.

Lastly, it seems very useful to analyse the potential of the new European cross-border association (ECBA)[58]. On 5 September 2023, the European Commission presented a proposal for a directive of the European Parliament and of the Council on European cross-border association[59]. The scope of this initiative is to enhance the internal market for non-profit organizations. It does this by establishing coordinated requirements for the formation and operation of European cross-border associations (ECBAs), ensuring these non-profit entities can effectively utilize their freedom of movement. Non-profit associations face legal uncertainty because 24 Member States[60] regulate their activities using distinct national legislation. This lack of uniformity necessitates adherence to diverse administrative requirements and procedures. The differences are apparent in the varying rules imposed on an association's formation, membership structure, and internal governance. The main aspect of this legal tool is the fact that the proposal's approach is highly targeted, making it distinct from the broad 1992 Commission proposal, which sought to establish a comprehensive European legal form for associations (the "European Association")[61]. This new Directive does not aim to create a single European statute; instead, it establishes a new national legal form that facilitates the cross-border activities and mobility of non-profit associations while preserving respect for existing national traditions and laws. Therefore, the potentiality of this last European initiative regards the elimination of the barriers that currently restrict the activities of non-profit associations across Member States. This action is necessary to ensure

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[55] Lenka Jančová, Christa Kammerhofer-Schlegel, Jérôme Leon Saulnier and Anja Puc , *Mechanism to resolve legal and administrative obstacles in a cross-border context* (EPRS Study PE 740.233, European Parliament May 2023). Available at: https://www.europarl.europa.eu/thinktank/en/document/EPRS_STU(2023)740233 (Accessed: 18 June 2025).

[56]Regulation (EU) 2025/925 of the European Parliament and of the Council of 7 May 2025 on a Border Regions' instrument for development and growth (BRIDGEforEU) [2025] OJ L 2025/925. Available at: https://eur-lex.europa.eu/eli/reg/2025/925/oj/eng (Accessed: 18 June 2025).

[57] European Commission, "BRIDGEforEU Regulation to address obstacles in border regions approved!" (6 May 2025). Available at: https://ec.europa.eu/regional_policy/whats-new/newsroom/05-06-2025-bridgeforeu-regulation-to-address-obstacles-in-border-regions-approved_en (Accessed: 18 June 2025).

[58] Justyna Dąbrowska, "European Cross-Border Associations: On the Social Function of Law" (2024) 24(4) ZP 179. See: European Parliament, "European cross-border associations" Briefing EU Legislation in Progress; European Parliament and "European cross-border associations European Parliament legislative resolution of 13 March 2024 on the proposal for a directive of the European Parliament and of the Council on European cross-border associations (COM(2023)0516 – C9-0326/2023 – 2023/0315(COD)) (Ordinary legislative procedure: first reading)" P9_TA(2024)0147.

[59] Commission, "Proposal for a directive of the European Parliament and of the Council on European cross-border association" COM/2023/516 final. See: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52023PC0516. (Accessed: 6 December 2025).

[60] In Ireland, Denmark and Sweden, associations are regulated by principles developed through doctrine and case-law.

[61] Proposal for a Council Regulation on the Statute for a European Association (91/273). Based on Article 114 TFEU, the proposal specified the rules of the formation, registration, constitution, functioning, financing, dissolution, liquidation and insolvency of the association. The proposal was withdrawn in 2005.

these organizations can effectively utilize their fundamental rights, such as the right of establishment and the ability to freely move capital and services throughout the internal market. By standardizing national legal provisions that hinder the exercise of these freedoms, this Directive directly contributes to improving the functioning of the internal market[62].

3 Comparative analysis of business law approaches

In order to inform potential approaches to the establishment of an EU business law, this section examines three significant non-EU legal frameworks: OHADA, the UCC, and the HGB. The Organization for the Harmonization of Business Law in Africa (OHADA)[63], established in 1993 with the Treaty on the Harmonization of Business Law in Africa[64], is widely recognized as a crucial lever for stimulating growth in regional trade and foreign investment[65]. As the first article of the Treaty establishes, the harmonisation of business laws in the Contracting States is pursued by "the elaboration and adoption of simple modern common rules adapted to their economies, by setting up appropriate judicial procedures, and by encouraging arbitration for the settlement of contractual disputes". A crucial aspect of OHADA is that, to successfully implement this Treaty, business law is defined in a broad way as it covers key areas such as company law (including the classification of trading entities), debt and credit management, enforcement procedures, and insolvency (bankruptcy, receiverships) and arbitration. It also specifically includes employment, accounting, transportation, and sales laws. Furthermore, the scope of business law may be expanded to include any other topic that the Council of Ministers unanimously agrees to add, in accordance with the Treaty's goals (Article 2).

Another approach is the Uniform Commercial Code (UCC)[66] in the United States, which has been instrumental in facilitating the creation of a market of critical size. This example illustrates how legal convergence can emerge from voluntary cooperation driven by economic incentives. Drafted collaboratively by the Uniform Law Commission (ULC) and the American Law Institute (ALI), the UCC was created as a model text to standardize commercial law across the states. Its impact has been significant, with 49 of the 50 states transposing it almost entirely into their respective laws; even Louisiana, which uses a civil law tradition, adopted all but one of its articles. What makes the UCC particularly noteworthy is that this widespread adoption was not mandated by the federal government, but instead represents a striking case of spontaneous legal uniformization among the individual states[67]. Accordingly, the UCC is to be interpreted and applied liberally, aiming to simplify, clarify, and modernize the law governing commercial transactions; to permit the continued expansion of commercial practices through custom, usage, and agreements of the parties and to make uniform the law among various jurisdictions[68].

On the other hand, Germany's system of unified commercial law through binding federal legislation (so-called *Handelsgesetzbuch* **-** HGB)[69] illustrates the efficacy of a top-down method in securing more

[62] Commission, "Proposal for a directive of the European Parliament and of the Council on European cross-border association" COM/2023/516 final 15.

[63] See: Jonathan Bashi Rudahindwa, "OHADA and the Making of Transnational Commercial Law in Africa" (2018) 11 LDR 371; Alhousseini Mouloul, *Understanding the Organization for the Harmonization of Business Laws in Africa (O.H.A.D.A.)*, (2nd edn, 2009); Peter Winship, "Law and Development in West and Central Africa (OHADA)" , (2015) SMU Dedman School of Law Legal Studies Research Paper No 272 1; Adam B. Elhiraika, Allan C. K. Mukungu, Wanjiku Nyoike, "Regional Integration and Policy Challenges in Africa" (Palgrave Macmillan 2015); Ngaundje Leno Doris, "The OHADA Structure as a possible model for the development of a commercial law structure in the Southern African Development Community (SADC)" (2020) 03 International Journal of Social Sciences and Management Review 1.

[64] Current members: Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Comoros, the Republic of Congo, Côte d'Ivoire, the Democratic Republic of Congo, Equatorial Guinea, Gabon, Guinea, Guinea-Bissau, Mali, Niger, Senegal, and Togo. See: https://www.ohada.org/en/treaty-amending-the-treaty-on-the-harmonization-of-business-law-in-africa/.

[65] Enrico Letta, *Much More Than a Market: High-Level Report on the future of the Single Market* (Report to the European Council 2024) 108.

[66] Available at: https://www.uniformlaws.org/acts/ucc (Accessed: 19 June 2025).

[67] Matthias Lehmann, "EU Law-Making 2.0: The Prospect of a European Business Code" (2020) 28 *European Review of Private Law* 79.

[68] Section 1-103. Construction of [Uniform Commercial Code] to Promote its Purposes and Policies: Applicability of Supplemental Principles of Law. See: https://ia902304.us.archive.org/34/items/uniform-commercial-code/Uniform%20Commercial%20Code.pdf.

[69] Available at: https://www.gesetze-im-internet.de/hgb/ (Accessed: 19 June 2025).

control and uniformity. The current German Commercial Code was adopted in 1897 and entered into force in 1900. This code replaced the older one: *Allgemeines Deutsches Handelsgesetzbuch (ADHGB)*[70]. In contrast to the older code, the new version does not include the commercial transactions section, which is regulated by the German civil code of 1897 (*Bürgerliches Gesetzbuch* - BGB). Due to the impossibility for the new commercial code to encompass a "private law cosmos", the system had to be reshaped. The scope of this code includes the definitions and norms regarding commercial entities, commercial partnerships and silent partnership, accounting and financial reporting for all traders, with supplementary provisions for share capital companies and commercial transactions and specific regulations for different types of contracts[71].

4 Enhanced cooperation in the implementation of the 28th regime

The 28th regime is envisioned to be established through the creation of the European Business Code (Code européen des affaires). The underlying rationale for such a Code is to provide a harmonized legal tool that could operate in parallel with, and in certain cases prevail over, national laws.

The Report *Much More than a Market* outlines a perspective of reinforcing the European integration that is both ambitious and pragmatic: it seeks to progressively build a unified legal context for business within the EU, while remaining focused on the need for flexibility and stakeholder participation throughout the process. How can this goal be pursued?

A study for the European Economic and Social Committee (EESC) highlights that the 28th regime needs a legal basis, with Article 114 TFEU[72] being the most appropriate for addressing regulatory differences that impede the internal market. For issues directly related to corporate legal forms and freedom of establishment, Article 50 TFEU[73] may also serve as a suitable legal basis. The politically sensitive Article 352 TFEU[74] (the flexibility clause), which requires Council unanimity, should only be used as a last resort

[70] See: https://max-eup2012.mpipriv.de/index.php/Allgemeines_Deutsches_Handelsgesetzbuch_(ADHGB) (Accessed: 01 February 2026).

[71] Johannes Flume, "Law and Commerce – The Evolution of Codified Business Law in Europe" (2014) Comparative Legal History 17. See: Holger Fleischer, "The Menagerie of Organizational Forms in Germany Company Law" (2023) Law Working Paper 1.

[72] Article 114 TFEU: "Save where otherwise provided in the Treaties, the following provisions shall apply for the achievement of the objectives set out in Article 26. The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market".

[73] Article 50 TFEU: "Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, shall act by means of directives. 2. The European Parliament, the Council and the Commission shall carry out the duties devolving upon them under the preceding provisions, in particular: (a) by according, as a general rule, priority treatment to activities where freedom of establishment makes a particularly valuable contribution to the development of production and trade; (b) by ensuring close cooperation between the competent authorities in the Member States in order to ascertain the particular situation within the Union of the various activities concerned; (c) by abolishing those administrative procedures and practices, whether resulting from national legislation or from agreements previously concluded between Member States, the maintenance of which would form an obstacle to freedom of establishment; (d) by ensuring that workers of one Member State employed in the territory of another Member State may remain in that territory for the purpose of taking up activities therein as self-employed persons, where they satisfy the conditions which they would be required to satisfy if they were entering that State at the time when they intended to take up such activities; (e) by enabling a national of one Member State to acquire and use land and buildings situated in the territory of another Member State, in so far as this does not conflict with the principles laid down in Article 39(2); (f) by effecting the progressive abolition of restrictions on freedom of establishment in every branch of activity under consideration, both as regards the conditions for setting up agencies, branches or subsidiaries in the territory of a Member State and as regards the subsidiaries in the territory of a Member State and as regards the conditions governing the entry of personnel belonging to the main establishment into managerial or supervisory posts in such agencies, branches or subsidiaries; (g) by coordinating to the necessary extent the safeguards which, for the protection of the interests of members and others, are required by Member States of companies or firms within the meaning of the second paragraph of Article 54 with a view to making such safeguards equivalent throughout the Union; (h) by satisfying themselves that the conditions of establishment are not distorted by aids granted by Member States".

[74] Article 352 TFEU: "If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures. Where the measures in question are adopted by the Council in accordance with a special legislative procedure, it shall also act unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament".

when no other Treaty provision applies. To guarantee uniform application and legal certainty, qualities essential for an optional yet harmonized framework, the authors indicated a Regulation as the best fitting legal instrument, due to the risk of using a Directive to introduce varying national transpositions, thereby undermining the regime's intended coherent character[75].

Should political conditions prevent the EU from utilizing Articles 114 and 352 TFEU to realize the optional EU regime, it is suggested to explore alternative ways to achieve this objective. The principal models of differentiated integration include *Variable Geometry Europe*, *Multi-Speed Europe* (or *Two-Speed Europe*), *Concentric Circles Europe*, and *À la Carte Europe* (also referred to as *Opt-Out Europe*)[76]. Historically, this logic is exemplified by the creation of the Schengen Area, a paradigmatic case of *Variable Geometry Europe*, and by the introduction of the Euro, which followed the *Multi-Speed Europe* model[77].

It is well-known that key advancements in European integration weren't embraced by all Member States[78], primarily because of their political motivations. Acknowledging this need for flexible integration as early as the 1990s[79], the Amsterdam Treaty (1999) subsequently institutionalized enhanced cooperation[80].

Within this scenario, enhanced cooperation constitutes one of the primary legal instruments for implementing the Variable Geometry model by enabling a minimum number of willing Member States to deepen their integration in specific policy areas within the institutional framework of the European Union, even when not all Member States are able or willing to participate. By combining institutional legitimacy with the flexibility required to accommodate diversity and future participation, enhanced cooperation aims to advance the Union's objectives, protect its interests, and strengthen the overall integration process. This mechanism is grounded in the recognition that European integration increasingly requires differentiated approaches in response to varying levels of political will, as well as cultural, economic, and societal readiness among Member States.

However, enhanced cooperation must not contrast with EU Law, undermine the internal market or economic, social, and territorial cohesion, nor create trade barriers, discrimination, or distorting competition among Member States. Acts adopted within the framework of enhanced cooperation bind

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[75] Commission, "Proposal for a Directive of the European Parliament and of the Council on European cross-border associations, Brussels, 5.9.2023" COM(2023) 516 final. Available at: EUR-Lex - 52023PC0516 - EN - EUR-Lex (Accessed: 28 November 2025).

[76] Jan Barcz, "Flexible Integration as a Target System of Governance for the European Union" (2015) 18 Yearbook of Polish European Studies 59. Available at: https://www.ceeol.com/search/article-detail?id=442425 (Accessed: 20 June 2025); Benjamin Leruth, Stefan Gänzle and Jarle Trondal, "Introduction: Differentiation in the European Union as a field of study" in Benjamin Leruth, Stefan Gänzle and Jarle Trondal (eds), *The Routledge Handbook of Differentiation in the European Union* (Routledge 2022) 5. Available at: https://library.oapen.org/bitstream/handle/20.500.12657/54470/9780367149659_10.4324_9780429054136-1.pdf?sequence=1 (Accessed: 20 June 2025): "Stubb's study is the first to conceptualize differentiated integration by listing about thirty models and classifying the mechanism into three categories linked to general concepts of European integration: 'time', with 'multi- speed Europe' as the main concept based on different temporal stages of integration (temporal differentiation); 'space', with 'variable geometry Europe' as the main concept based on differentiated integration of member states (territorial differentiation); and 'matter', with 'à la carte Europe' as the main concept focusing on differentiated integration across policy domains (sectoral differentiation)."; Kai Weiss, "A Vision of Visions for Europe's Future" (Austrian Economics Center 2019) 3-4. Available at: https://www.austriancenter.com/wp-content/uploads/2019/05/Vision_of_Visions_Final.pdf (Accessed: 20 June 2025).

[77] Stefania Baroncelli, "Differentiated Governance in European Economic and Monetary Union: From Maastricht to Next Generation EU" (2022) 7(2) European Papers - A Journal on Law and Integration 867 882. Available at: https://www.europeanpapers.eu/it/system/files/pdf_version/EP_eJ_2022_2_SS1_2_Stefania_Baroncelli_00584.pdf (Accessed: 20 June 2025); Marie De Somer, Funda Tekin and Vittoria Meissner, "Schengen under Pressure: Differentiation or Disintegration?" (EU IDEA Policy Papers No 7, EU IDEA 2020). Available at:https://www.iai.it/sites/default/files/euidea_pp_7.pdf (Accessed: 20 June 2025).

[78] Jelena Ćeranić, "Flexibility concept in the context of European integration–evolution, survey and perspectives", (2017) 4 SPZ 9 23. Available at: https://www.ceeol.com/search/article-detail?id=613827 (Accessed: 20 June 2025).

[79] Girolamo Strozzi and Roberto Mastroianni, *Diritto dell'Unione Europea: parte istituzionale* (Giappichelli Editore 2023) 35.

[80] Daniela A. Kroll and Dirk Leuffen, "Enhanced Cooperation in Practice. An Analysis of Differentiated Integration in EU Secondary Law" (2015) 22 (3) Journal of European Public Policy 353. Available at: https://kops.uni-konstanz.de/server/api/core/bitstreams/e5bd1820-e4f6-43df-82c5-1e5f1f572f6f/content (Accessed at: 1 July 2025).
Enhanced cooperation is regulated by article 20 of the Treaty on European Union (TEU) and articles from 326 to 334 of the Treaty on the Function of the European Union (TFEU).

only the participating Member States; such acts are not regarded as part of the *acquis communautaire*, which candidate states must accept upon accession.

The process of authorizing enhanced cooperation begins under specific conditions, ensuring it is a measure of "last resort" (*ultima ratio*), which applies when the Commission and the Council deem that action by all EU Member States on a specific issue is politically impossible[81]. Furthermore, a minimum of nine Member States must agree to participate. The initiation process varies depending on the policy area: for most areas, excluding those of exclusive competence and the Common Foreign and Security Policy (CFSP), interested Member States submit a request to the Commission detailing their scope and objectives. The Commission then decides whether to present a proposal to the Council, explaining its reasons if it chooses not to[82]. Finally, the authorization decision itself also differs: for non-CFSP areas, the Council grants authorization by qualified majority voting based on a Commission proposal and with the European Parliament's consent[83].

Based on this, a 28th regime could be realized by applying appropriate EU legal acts to those areas that do not fall within the scope of EU exclusive competence[84]. Any remaining aspects, in light of Article 329 of the TFEU, would then be addressed through enhanced cooperation.

However, it is important to reflect on insights concerning the implications of adopting enhanced cooperation. Enhanced cooperation has been used five times[85]: for divorce law in 2010 (the first time to be adopted)[86], for patent matters in 2012[87], for financial transaction tax (FTT)[88], for property regime rules in 2016[89] and for European Public Prosecutor's Office ("the EPPO")[90].

As confirmed by the Court of Justice of the European Union (CJEU), the legitimacy of enhanced cooperation is intrinsically linked to its use as a measure of last resort[91]. The CJEU ruled several times on the appropriate use of enhanced cooperation as a last resort[92]. An emblematic judgment of the CJEU concerns the use of enhanced cooperation on patent[93]: C-274/11 (Spain v Council) and C-295/11 (Italy v Council), where Spain and Italy asked for the annulment of Council Decision 2011/167 authorising enhanced cooperation on unitary patent protection. They accused the Council of circumventing the mandatory unanimity vote by employing enhanced cooperation procedure prematurely. They pointed

[81] Federico Fabbrini, "The Enhanced Cooperation Procedure: A Study in Multispeed Integration" [2012] Centro Studi sul Federalismo 8.

[82] For CFSP areas, the request goes directly to the Council. Here, the High Representative and the Commission offer their opinions on the proposal's consistency with Union policies, and the European Parliament is kept informed.

[83] For CFSP areas, a unanimous decision by the Council is required. See also: G Strozzi and R Mastroianni, *Diritto dell'Unione Europea: parte istituzionale* (Giappichelli Editore 2023) 36–37.

[84] And the common foreign and security policy (Article 329 TFEU).

[85] See: Tomasz Kubin, "A 'Last Resort' or a 'Bypass'? Development of Enhanced Cooperation and Its Meaning for the Problem of Stagnation of Integration in the European Union" (2017) YPES 31; Robert Böttner, "The Instrument of Enhanced Cooperation: Pitfalls and Possibilities for Differentiated Integration" 7 (2022) European Papers 1145; Ivana Kiendl Krišto and Cecilia Isaksson, "Implementation of the Treaty provisions concerning enhanced cooperation" (EPRS Study, PE 627.152, 2018); Wolfgang Wessels and Carsten Gerards, "The Implementation of Enhanced Cooperation in the European Union" (Policy Department for Citizens' Rights and Constitutional Affairs Study, PE 604.987, 2018); Centre for European Policy Studies and others, *Establishing the 28th regime in Europe: a unified legal framework to support growth and business* (Publication Office of the European Union 2025) 1.

[86] Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation [2010] OJ L 343. See: https://eur-lex.europa.eu/eli/reg/2010/1259/oj/eng (Accessed: 12 December 2025). (Accessed: 12 December 2025).

[87] Regulation (EU) No 1257/2012 of the European Parliament and of the Council of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection [2012] OJ L 361. See: https://eur-lex.europa.eu/eli/reg/2012/1257/oj/eng. (Accessed: 12 December 2025).

[88] Tomasz Kubin, "A 'Last Resort' or a 'Bypass'? Development of Enhanced Cooperation and Its Meaning for the Problem of Stagnation of Integration in the European Union" (2017) YPES 38.

[89] Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes [2016] OJ L 183. See: https://eur-lex.europa.eu/eli/reg/2016/1103/oj/eng. (Accessed: 12 December 2025).

[90] Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO') [2017] OJ L 283. See: https://eur-lex.europa.eu/eli/reg/2017/1939/oj/eng. (Accessed: 12 December 2025).

[91] Article 20(2) TEU.

[92] Ivana Kiendl Krišto and Cecilia Isaksson, "Implementation of the Treaty provisions concerning enhanced cooperation" (EPRS Study, PE 627.152, 2018) 6.

93 C-274/11 and C-295/11 Unitary patent – Decision authorising enhanced cooperation under Article 329(1) TFEU – Actions for annulment on grounds of lack of competence, misuse of powers and infringement of the Treaties – Conditions laid down in Article 20 TEU and in Articles 326 TFEU and 327 TFEU – Non-exclusive competence – Decision adopted 'as a last resort' – Preserving the interests of the Union [2013].

out that objections raised in the Council were disregarded and that the decision was rushed. They maintained that not all avenues for negotiation on language arrangements had been exhausted, concluding that enhanced procedure was a deliberate tactic to exclude some Member States and bypass the unanimity rule. However, the Court dismissed the actions against the Council, ruling that the latter had taken all the necessary steps in the legislative process. Specifically, the Court granted the Council wide discretion in determining the point of last resort, stating that it is "best placed to determine whether the Member States have demonstrated any willingness to compromise and are in a position to put forward proposals capable of leading to the adoption of legislation for the Union as a whole in the foreseeable future". In other words, the CJEU considers that the establishment of enhanced cooperation does not constitute a circumvention of Union law if unanimity cannot be achieved in an area where it is required by the Treaties. As is clear from Article 333(1) TFEU, which allows for transition from unanimity to qualified majority voting, enhanced cooperation is permissible in such policy areas[94].

Nonetheless, this approach could lead to a distorting use of enhanced cooperation by a majority of states to circumvent the voting rules applicable in the Council and enact its preferred policy choice against the wishes of dissenting states[95]. A further negative consequence of the distortion produced by enhanced cooperation is the so-called "spaghetti bowl" effect: a complex, overlapping web of groupings and commitments characterized by project-specific opt-ins and opt-outs that are often based exclusively on national interests. This trend gained significant traction following the end of the "permissive consensus", the broad, tacit acceptance prevailing at the time of the Maastricht Treaty, as the idea of a "pick-and-choose" approach began to find common currency, particularly among emerging Eurosceptic movements[96]. Based on this, there are warnings that such an "Olympic circle" use of enhanced cooperation, especially in closely related fields of family law, will fragment the legal framework of EU law[97]. Furthermore, being initiated and shaped by the EU Member States, who determine its scope, content, and nature, enhanced cooperation poses a further risk: it may be perceived as undermining the Commission's right of exclusive legislative initiative[98].

Conclusion

This paper has explored the 28th regime, analyzing its main characteristics and ways of implementation. To understand the practical forms of this process, the study situated this topic within the current EU framework, identifying the legal tools that can be used by institutions and market actors while explaining their conditions and limits.

Within this dynamic context, the method that will be chosen is essential. Rather than limiting themselves to a short-term perspective, Member States should consider a more open and flexible approach, enhancing the European values and the unity of the Union as a whole. In this regard, enhanced cooperation may serve as a pivotal mechanism. Unlike intergovernmental agreements, it functions wholly within the EU legal order, offering a framework that enables willing Member States to address common challenges without undermining the Union’s cohesion.

However, as highlighted in this article, enhanced cooperation must be understood as an instrument of last resort, whose use is subject to strict procedural and substantive conditions in order to prevent

[94] Robert Böttner, "The Instrument of Enhanced Cooperation: Pitfalls and Possibilities for Differentiated Integration" 7 (2022) European Papers 1156.
[95] Federico Fabbrini, "The Enhanced Cooperation Procedure: A Study in Multispeed Integration" [2012] Centro Studi sul Federalismo 16.
[96] Wolfgang Wessels and Carsten Gerards, "The Implementation of Enhanced Cooperation in the European Union" (Policy Department for Citizens' Rights and Constitutional Affairs Study, PE 604.987, 2018) 13.
[97] Ivana Kiendl Krišto and Cecilia Isaksson, "Implementation of the Treaty provisions concerning enhanced cooperation" (EPRS Study, PE 627.152, 2018) 4; Tomasz Kubin, "A ‘Last Resort’ or a ‘Bypass’? Development of Enhanced Cooperation and Its Meaning for the Problem of Stagnation of Integration in the European Union" (2017) YPES 51.
[98] Tomasz Kubin, "A ‘Last Resort’ or a ‘Bypass’? Development of Enhanced Cooperation and Its Meaning for the Problem of Stagnation of Integration in the European Union" (2017) YPES 51.

undue fragmentation of the EU legal order. At the same time, enhanced cooperation constitutes a tool, but it is not sufficient by itself. The 28th regime cannot operate in a vacuum. It is an integral part of the EU's multi-level governance structure, requiring implementation by public authorities and interaction with national courts and markets. Its success is not theoretical but practical, depending entirely on its capacity for functional integration into the existing legal and institutional ecosystems of the Member States, rather than maintaining an abstract distance[99].

To pursue this goal, comparative analysis can offer some suggestions through the examination of different approaches about the ways of addressing the current challenges in business. As previously mentioned, important examples of supranational harmonization of business law are the *Organisation pour l'Harmonisation du Droit des Affaires en Afrique* (OHADA)[100], United States *Uniform Commercial Code* (UCC)[101] and German system of unified commercial law through binding federal legislation (so-called *Handelsgesetzbuch* **-** HGB)[102]. By combining these approaches, the 28th regime could, over time, develop through bottom-up harmonization similar to the U.S. experience, while simultaneously relying on symmetrical, institution-led coordination inspired by the German model, and, drawing on the OHADA experience, gradually determining the appropriate extent of its regulatory scope. Such a gradual and differentiated approach appears particularly relevant in light of the risks associated with an excessive or distortive use of enhanced cooperation, including the fragmentation of legal regimes and the proliferation of overlapping opt-in frameworks.

Indeed, the article further distinguishes between exclusive and non-exclusive EU competences, emphasizing the necessity of progressively aligning formal legal instruments with the demands coming from the territories. Hence, the 28th regime should not necessarily be interpreted and implemented as a rigid top-down imposition, but as a flexible initiative for the development of optional European business law, through a step-by-step process that allows for gradual adaptation, institutional participation, and, critically, a simplification of administrative and bureaucratic procedures that represent some of the main obstacles in increasing the competitiveness and attractiveness of the EU internal market[103].

Nevertheless, this undertaking must be coordinated with the existing EU legal order. Moreover, its realization may symbolize a form of "more Europe" in the business area. This perception could encounter opposition from those favoring stronger national autonomy. Then, some Member States may seek to preserve the attractiveness of their own legal frameworks by offering preferable alternatives to the optional regime. For example, jurisdictions with strong consumer protection standards may perceive participation as a risk of diminishing these safeguards, which could hinder adoption.

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[99] Commission, "Proposal for a Directive of the European Parliament and of the Council on European cross-border associations, Brussels, 5.9.2023" COM(2023) 516 final. Available at: EUR-Lex - 52023PC0516 - EN - EUR-Lex (Accessed: 28 November 2025).

[100] See: Jonathan Bashi Rudahindwa, "OHADA and the Making of Transnational Commercial Law in Africa" (2018) 11 LDR 371; Alhousseini Mouloul, *Understanding the Organization for the Harmonization of Business Laws in Africa (O.H.A.D.A.)*, (2nd edn, 2009); Peter Winship, "Law and Development in West and Central Africa (OHADA)" , (2015) SMU Dedman School of Law Legal Studies Research Paper No 272 1; Adam B. Elhiraika, Allan C. K. Mukungu, Wanjiku Nyoike, "Regional Integration and Policy Challenges in Africa" (Palgrave Macmillan 2015); Ngaundje Leno Doris, "The OHADA Structure as a possible model for the development of a commercial law structure in the Southern African Development Community (SADC)" (2020) 03 International Journal of Social Sciences and Management Review 1.

[101] Available at: https://www.uniformlaws.org/acts/ucc (Accessed: 19 June 2025).

[102] Available at: https://www.gesetze-im-internet.de/hgb/ (Accessed: 19 June 2025).

[103] To this end, it seems very important that the Commission launched a public consultation on 8 July 2025 that ended on 30 September 2025. That consultation was open for contributions from all stakeholders but was in particular focused on companies, with a special attention on innovative ones, start-ups and scale-ups, representatives of business and industry associations, entrepreneurs, investors, legal practitioners, Member State authorities, business registers, trade unions and academics. Driven by the business community's requests, this move sought to give companies, especially innovative players, a harmonized set of regulations to simplify their investment and operations within the Single Market. It would implement a modern corporate legal structure, addressing various critical business areas, by fully utilizing the EU's existing digital company law procedures. The framework may be further enhanced by broader, supportive policies designed to foster the growth and development of innovative enterprises throughout the EU. The participation was significant, as the Commission received 1.470 valid feedback instances, 46.94% of which came from EU citizens and 36.05% from enterprises. The EU Member State from which the largest number of suggestions originated is Germany (26.39%). The outcome of this step will be published in 2026. See: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/14674-28th-regime-a-single-harmonized-set-of-rules-for-innovative-companies-throughout-the-EU/public-consultation_en. (Accessed: 10 December 2025).

Ultimately, the success of the 28th regime will depend not only on its legal design, but also on the political willingness to embrace a shared vision of integration, one that balances flexibility with uniformity and innovation with legal certainty, while preserving the coordinating role of EU institutions and the interpretations of the Court of Justice.