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How a 28th company law regime jeopardises workers' rights

Marcus Meyer-Erdmann and Aline Hoffmann

Marcus Meyer-Erdmann is Senior Researcher at the European Trade Union Institute (ETUI) in Brussels, Belgium and Assistant Professor at Erasmus University Rotterdam, the Netherlands.

Aline Hoffmann is Coordinator of the European Workers' Participation Competence Centre (EWPCC) and Head of the Unit on the Europeanisation of Industrial Relations at ETUI.

Policy recommendations

The European Commission is soon expected to propose a European company law framework designed specifically for 'innovative' companies. The evidence shows that the Achilles heel of a '28th company law regime' is its inevitable impact in areas beyond company law, for example on labour law, taxation, insolvency and social security.

A new company law framework for 'innovative' companies must ensure:

- precise, enforceable eligibility criteria to prevent abuses;
- anti-abuse rules that block 'letterbox' setups and the exploitation of known loopholes;
- dynamic worker participation safeguards that cannot be frozen or evaded;
- guardrails for any Employee Stock Ownership Plans (ESOPs) to protect wages and revenues;
- a registration process that preserves real scrutiny over speed: a one-stop digital portal can be built while maintaining necessary checks and in a realistic verification timeframe using existing instruments.

Fostering innovation in the EU is possible without eroding workers' rights or regulatory integrity if the relevant measures reflect lessons derived from existing instruments, develop new instruments and ensure robust cross-border enforcement.

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Introduction

This Policy Brief seeks to inform the upcoming debate on the European Commission's expected proposal for a European company law framework for 'innovative' companies (that is, start-ups and scale-ups). Company law governs the creation, operation and dissolution of companies, including the rights and responsibilities of shareholders, directors and other stakeholders, such as its workers. EU company law seeks to provide the legal framework needed to enable the freedom of movement of capital and services across the Union, while providing safeguards to protect the interests of key stakeholders, such as investors, creditors or workers. But because company law intersects with other areas of law – such as labour law, social security and taxation – changes in company law must also take into account their implications for other stakeholders, especially workers and their trade unions.

As part of its Competitiveness Compass roadmap, the European Commission plans to propose a new '28th company law regime' as early as the last quarter of 2025. Emanating from the European Commission's Project Group on Startups and Scaleups, this would be a third attempt – after the failed European private company (*Societas Privata Europaea*: SPE, 2008) and the withdrawn single-member private limited liability company (*Societas Unius Personae*: SUP, 2014) – to create an EU company form that sits alongside national company forms: hence the term '28th regime'. Both earlier attempts were shelved in the face of significant opposition from Member States and societal stakeholders.

This third proposal for a 28th regime resurrects these earlier attempts but this time targets 'innovative' companies, an undefined category apparently covering 'start-ups' (companies that have yet to achieve commercial maturity) and 'scale-ups' (proven business models growing rapidly in revenue and/or employment).

The European Commission acknowledges that a 28th regime would necessarily go beyond company law, with implications for insolvency, taxation and labour law, to name but a few. Because company law anchors these adjacent areas of law and overlapping topics (for example, employee stock options and individual and collective labour law), changes in company law have direct and indirect impacts on existing stakeholder rights that need safeguarding. These include workers' rights to information, consultation and participation, collective bargaining and (enforcement of) individual workers' rights, as well as creditor and shareholder protections. The proposal has accordingly set alarm bells ringing across Europe.

This Policy Brief explores what is known so far about the proposed 28th regime, draws lessons from the SPE/SUP failures and experience with the 2001 Statute for a European Company (*Societas Europaea*: SE), and assesses implications for substantive labour rights, while identifying solutions already in place or forthcoming.

Why is this proposal coming now?

Although Europe hosts approximately as many start-ups as the United States, the European Commission argues that fragmented company laws across the EU hamper the commercialisation of start-ups by, for example, limiting access to funding (venture capital) and research and development (R&D) clusters. The Commission's 'EU Startup and Scaleup Strategy' of May 2025 rightly identifies digitalisation, improving the ecosystem (R&D clusters, compute clusters) and funding opportunities for start-ups and scale-ups as measures to be pursued.

But the 28th company law regime proposal would effectively undermine existing stakeholder protections at national level by putting them in regulatory competition with more robust national-level company law forms.

It also remains unclear which firms qualify as 'innovative' — and when a start-up ceases to be one — raising the risk of abuses by existing companies and groups seeking to circumvent applicable rules, as seen for over 20 years with the SE. What is the justification for treating these companies — and their workers — differently from 'normal' companies?

Recent EU measures already advance the company law harmonisation agenda: the 2019 Directives on cross-border company mobility (2019/2121) and digitalisation of company law (2019/1151 and 2025/25) have accelerated mobility since the 2001 SE framework (2157/2001 and 2001/86) and the 2005 Cross-Border Mergers Directive (2005/56). This begs the question of whether a separate 28th regime is needed, especially given threats to stakeholder protections.

The failed attempts of the SPE and SUP yield important lessons on the pitfalls of legislative initiatives on pan-European company forms. They will be briefly revisited below. The existing framework on SEs and SCEs (*Societas Cooperativa Europaea*: SCE) provides important lessons, particularly on the use of these company forms in practice and empirical evidence concerning stakeholder protections in SEs and SCEs.

The failed attempts of the SPE and SUP

In 2008 the Commission proposed the European Private Company (*Societas Privata Europaea*: SPE) as part of its 'Small Business Act for Europe' to create a simple, EU-wide private-company form for small and medium-sized enterprises (SMEs), eliminating the need to reincorporate in each Member State and reducing administrative burdens. This goal is largely unchanged in the current proposal for the 28th regime. The European Parliament and trade unions sought stronger worker participation guarantees and a genuine cross-border component to employee participation. Critics warned that the absence of a cap on size or revenue for SPEs raised the risk that large corporations might abuse the SPE to sidestep national labour and creditor protections. Facing persistent opposition, the European Commission formally withdrew the SPE in 2014 under its regulatory fitness and performance programme (REFIT) review.

Shortly thereafter, the European Commission proposed the single-member private limited liability company (*Societas Unius Personae*: SUP): key features included online incorporation via standard template, €1 minimum capital, and

a carve-out approach harmonising only limited aspects while leaving most company law to Member States.

In 2015, the European Parliament's Employment and Social Affairs Committee urged rejection of the proposal. Its Opinion, adopted by a two-thirds majority, cited the SUP's potential to undercut labour standards, weaken creditor safeguards and spur forum-shopping for lax regimes. Some national parliaments also objected on subsidiarity grounds. The Council's compromise removed the separation of registered seat from principal place of business, but concerns over inadequate stakeholder safeguards persisted. The European Commission withdrew the SUP proposal in 2018.

Third time a charm?

The EU-Inc proposal as blueprint

A decade on, the European Commission has now embarked on a very similar exercise: key aspects of the 28th company law regime put forward as part of its Competitiveness Compass are unchanged compared with the ill-fated SPE/SUP proposals. It is therefore worth examining the arguments put forward in the debates around all three proposals together.

While many details are still unknown, it is clear from the broader discussions that a proposal put forward by 'EU-Inc.org' (2025), a lobbying initiative by start-ups and venture capital firms, has served as the blueprint for the Commission's 28th regime proposal. EU-Inc submitted their proposal directly to Commissioners Michael McGrath (responsible for Democracy, Justice, the Rule of Law and Consumer Protection) and Ekaterina Zaharieva (in charge of Startups, Research and Innovation), in February 2025 and have stated that they are in regular contact with the European Commission's Project Group on Startups and Scaleups.

EU-Inc's core ideas shape the discussions around the 28th company law regime. These include: (i) an EU-wide private limited liability form for 'innovative' companies targeting start-ups and scale-ups; (ii) no minimum capital requirement and a single founder/shareholder resident anywhere in the EU; (iii) a fully digital establishment process in any Member State; (iv) registration in a new EU-level online registry; (v) 'once-only' registration to operate across the EU; and (vi) registration approval within only 24 hours.

What's an innovative company?

The Commission's 'EU Startup and Scaleup Strategy' acknowledges that there is no shared EU-wide definition of a start-up, scale-up or 'innovative company'. Both the SPE and the SUP were ultimately undone by the lack of clarity about what companies would be targeted and this remains unresolved in the new proposal. Even though the SPE was designed for SMEs, there were no defined limits on company size or turnover.

In the absence of clear eligibility criteria or caps (repeating the SUP/SPE mistakes), large groups could exploit the 28th regime to bypass national labour and creditor protections. Minimum capital requirements also matter: in the context of the previous SUP debate, Teichmann (2016) already pointed to

empirical evidence that suggests that forms with no minimum capital attract less sustainable businesses, risking reputational harm to the 'EU' label.

One-stop, overnight company registration?

Incorporation involves more than issuing a birth certificate: it is crucial for ensuring compliance with legal and regulatory requirements protecting the business and its stakeholders, including its workers. Arguing that the intervention of national certifying authorities is too cumbersome, EU-Inc proposes the establishment of a new, single EU company registry. To further accelerate the registration process, access controls and revocation of an entry in the EU registry would be strictly limited, strongly curtailing legitimate scrutiny by stakeholders and authorities and undermining existing national-level anti-abuse checks.

But online registration is already enabled by the Digitalisation of Company Law Directives 1 (2019/1151) and 2 (2025/25). A one-stop digital portal could easily build on these existing provisions, without starting from scratch and introducing a new EU company form.

Under the initial SUP proposal, incorporation would be carried out within three days, but under pressure from Member States this was later increased to eight days to ensure adequate verification of information on both the company and its founder to protect stakeholders' interests. The EU-Inc proposal reduces this to 'under 24 hours'. It is understandable that registration should be easy, digital and 'once only', but no justification is provided regarding why it needs to be achieved overnight, thereby rendering the normal due diligence by company registries and notaries, including checks related to creditor protection, insolvency, tax and social security, virtually impossible. This heightens the risk of letterbox companies that enable forum shopping and social dumping.

Balancing company mobility with effective regulation

Attempts to enable company mobility across the EU have long been shaped by the dilemma of determining which laws apply to a company and the applicable rules concerning stakeholder protections: those of the state in which it is registered, or the laws of the place of economic activity? The SUP's envisaged split-seat approach drew criticism from some Member States as offering the opportunity to easily circumvent national rules on employee participation and other obligations. For example, an SUP formally registered in Ireland, but whose entire workforce was employed in Germany, would nonetheless not have been subject to German board-level employee representation.

While European Court of Justice case law (*Centros, Überseering, Inspire Art* and *Polbud*) has shown the need to balance freedom of establishment with the need for legal certainty, subsidiarity and regulatory effectiveness, the latest Company Law Package (2019/2121) and its anti-abuse clauses go some way towards balancing company law against stakeholder protections. The 28th regime would face the same unresolved tension between uniformity of company law standards versus the need for stakeholder protections and the urgent need for anti-abuse provisions to prohibit regime shopping, social dumping and the

evasion of workers' rights. Possible mismatches would be even more apparent in the case of small start-ups or rapidly growing scale-ups.

Losing information and consultation rights in start-ups and scale-ups?

Unsurprisingly perhaps, EU-Inc.org takes a dim view of worker participation. Seeking to ensure that employee information and consultation rights do not 'place an undue burden on companies moving in a fast-paced environment', EU-Inc proposes that information and consultation rights would apply only after a high threshold is reached, such as a certain number of employees (for example, 500) or a particular level of revenue. It should be noted that EU-Inc's proposed thresholds are far higher than existing information and consultation thresholds at national level, for instance in Austria and Germany (5), Luxembourg (15), Finland (20), France and the Netherlands (50), to name but a few. Furthermore, the framework Directive for informing and consulting employees (2002/14/EC) sets the general threshold at 20 or 50 employees.

Clearly, the European social model and the EU *acquis* foresee information and consultation rights even for employees in small companies. For EU-Inc, however, companies below the 500 employee threshold would engage with their workforce only 'informally, through newsletters, town halls, and occasional surveys, without the need for formal consultation'.

It is also noteworthy that board-level employee representation and voting rights are excluded from the EU-Inc. proposal, in favour of information and consultation in companies above a certain size or revenue threshold. As the EU-Inc coalition of entrepreneurs and investors put it, they seek to foster 'a culture of cooperation between employers and employees, based on mutual agreement rather than legal obligation'. This would directly undermine existing rules on board-level employee representation and those applicable to cross-border company transactions pursuant to Directive 2019/2121 or SE/SCE-formations, which specifically safeguard board-level employee representation.

The absence of organised structures at the incorporation of these companies could also have ripple effects on trade union recognition, representation and collective bargaining.

Worker participation rights for sale?

If EU-Inc's proposal would deprive workers of their rights to information and consultation rights and board-level employee representation just because they work for a start-up or scale-up, then perhaps the idea is to compensate them with Employee Stock Ownership Plans (ESOPs).

Seeking to address the lack of easily available venture capital in the EU, EU-Inc proposes a new pre-issuance investment instrument for outside investors; employees would also 'participate' in the company through share options issued to them by the company alongside their wages. As acknowledged by the Commission in its staff working document on the start-up and scale-up strategy, ESOPs carry risks to workers and public finances. Such stock options would not be taxable at issuance by the country of employment. Indeed, the stock options

would not be worth anything until they are sold, at which point they would be subject to (much lower) capital gains taxes. This would lead to significant losses in terms of income taxes and social security contributions for EU Member States compared with existing national company forms.

Financial participation schemes carry risks for employees (Pendleton 2019). The EU-Inc start-up ESOP would shift significant entrepreneurial risks onto workers in the context of a markedly higher start-up failure rate compared with 'regular' companies. A recent study found that less than half of start-ups survived the first five years (43 per cent; SMV Danmark 2023). In fact, in some sectors and countries, the failure rate is up to 90 per cent, with 10 per cent of start-ups not surviving the first year. EU-wide figures from the Commission/Eurostat show a one in five failure rate in the first year and a five-year failure rate overall of 55 per cent (Eurostat 2025).

Given that ESOPs are tied to a company's performance and share value, workers risk losing significant earnings. A particular danger arises where share ownership schemes make up a considerable portion of an employee's long-term savings. Company bankruptcy can wipe out employees' pensions. Finally, it is very difficult to ensure that ESOPs are not, in effect, calculated against collectively bargained wages or bonuses.

20 years of the European Company (SE): a lesson in circumvention?

The existing voluntarist SE regime and its uniform EU-wide core rules emerged from the search for a genuinely supranational corporate law regime that began in the 1970s. This culminated in the 2001 compromise, which paved the way for the first 'European company' form, in particular by leaving key aspects of workers' participation to negotiations between company-level social partners. As the main European company form, which has been in place for over two decades, the SE is a crucial point of reference in the current discussions on the 28th company law regime.

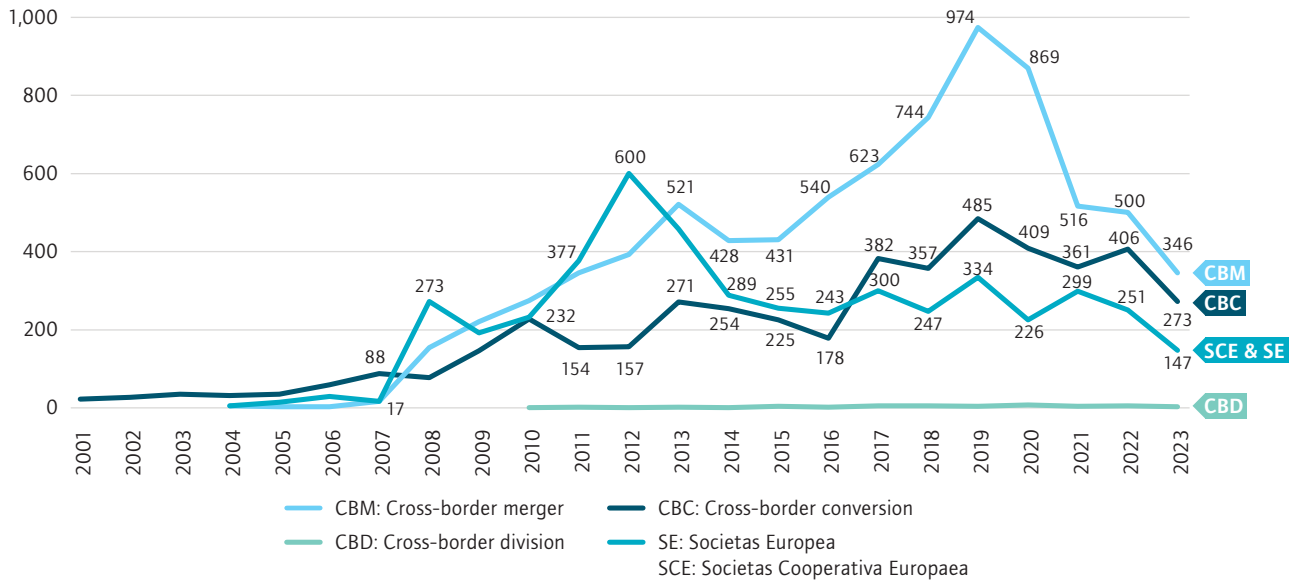
SEs have not driven cross-border company mobility in over a decade

Since the adoption of the SE Regulation and the accompanying SE Directive in 2001, the number of SEs/SCEs formed has increased every year, peaking at 600 new SEs created in 2012 alone (see Figure 1). The steadily declining trend in SE/SCE formations per year correlates with the introduction of the EU cross-border company mobility framework, which has covered mergers since 2008, as well as demergers and cross-border conversions/seat transfers since 2023. While the number of SE establishments has fallen significantly since 2012, cross-border mergers and conversions have continued to trend upwards overall.

As a result of this new possibility to move a company's seat across borders without establishing an SE, one of the main drivers of SE creation has disappeared. However, this has also exposed another key driver of SE creation. National board-level employee participation mechanisms and information and

consultation rights have been systematically circumvented through the use of the SE framework.

Figure 1 **Cross-border transactions and SE/SCE creations over time***



Note: * The ETUI-Erasmus University Cross-Border Company Mobility project tracks all cross-border company mobility and SE/SCE formations in the EU since 2001.

Source: ETUI-Erasmus University Cross-Border Company Mobility project (2025).

Shelf SEs are the key vehicle for circumventing the Directive's safeguards

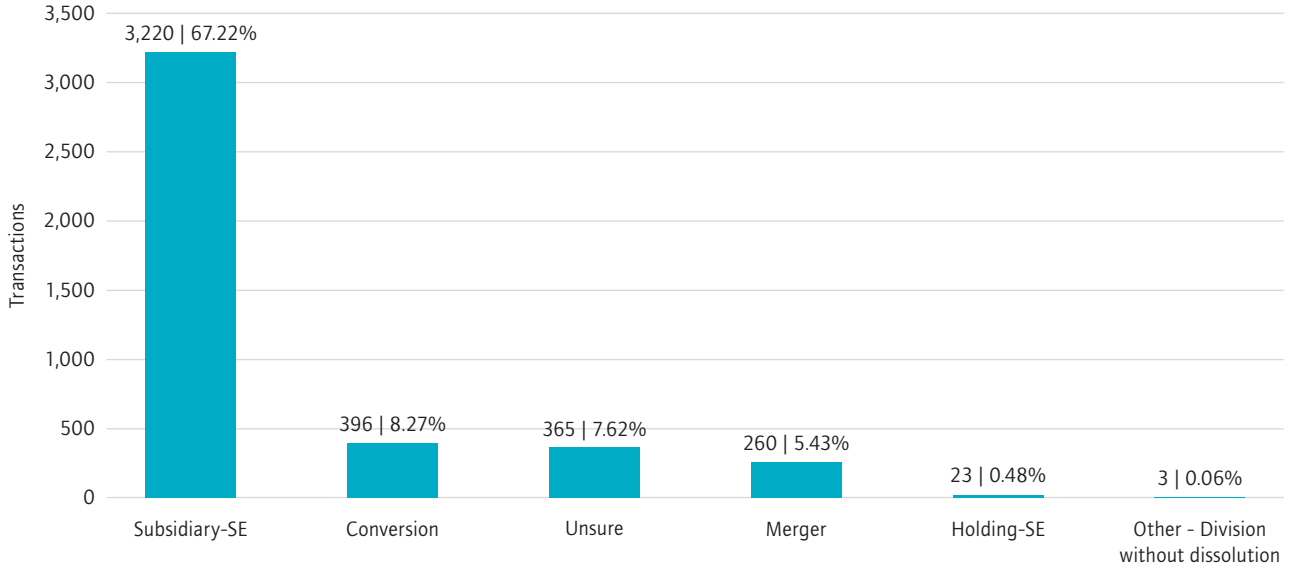
Fully two-thirds of all SEs have been set up as subsidiary SEs (see Figure 2). With very few exceptions, these can also be called 'shelf SEs', because they are empty company shells designed to be purchased 'off the shelf' and simply activated to be used as genuine EU companies under a new name rather than setting up a new company from scratch.

In this way, the shelf SE serves as a vehicle, but without requiring a cross-border element. The creation of shelf SEs through incubator SEs is particularly prevalent in the Czech Republic, Germany and Slovakia. At their peak in 2012, shelf SEs constituted nearly 90 per cent of all SE establishments and still account for the bulk of them in any given year.

How shelf SEs freeze out workers' rights

The so-called 'before-and-after principle' underpinning the SE Directive was intended to safeguard existing rights by ensuring that any board-level participation rights enjoyed 'before' the creation of the SE could be retained 'after' it. This principle was further accompanied by an agreement negotiated between employee representatives and management in a Special Negotiation Body (SNB).

Figure 2 **SE creations by type (aggregated)**



Note: * Subsidiary SEs are created by incubator SEs as 'shelf SEs' for later activation. Some data on SE creations prior to 2017 are unavailable (n.a. = 523, total N = 4790).

Source: ETUI-Erasmus University Cross-Border Company Mobility project (2025).

These safeguards are effective only at the moment of the SE's creation, however. The status quo of workers' participation at that moment is frozen indefinitely, with no trigger for future negotiations, even if an SE grows to exceed employee participation thresholds under national law.

This is the crippling weakness of the SE framework: by activating an empty shelf SE or converting an existing company just below the relevant national employee thresholds (for example, 25 employees in Swedish companies, 35 in Denmark, 100 in the Netherlands, 150 in Finland, 300 in Austria and 500/2000 in Germany), employee participation can be circumvented altogether. A particularly stark example is the proportion of companies with parity codetermined supervisory boards in Germany (that is, boards of companies with more than 2,000 employees, in which employee representatives hold half the seats) which fell from 68 per cent in 2019 to 61 per cent in 2022 (Sick 2024). Three-quarters of known cases of circumvention in Germany are based on structures that are facilitated by European company law. A striking statistic illustrates how systematic the circumvention is: five out of six SEs with over 2,000 domestic employees in Germany lack the parity codetermination they would have under German law (Sick 2024). The most recent *Olympus* judgment (2024) of the CJEU further aggravates this by concluding that the exclusion of renegotiation in the case of an SE without employee representatives is lawful in the case of the creation of a holding SE.

Furthermore, SE Works Councils and cross-border information and consultation rights can be circumvented by the same mechanism. Because they have no employees, empty shelf SEs are not required to establish an SNB to create an SE Works Council. SNBs were established only in companies that already had employees (and had usually set up a European Works Council under Directive 2009/38 EC and its predecessors), but it is extremely rare for

negotiations to be initiated after the activation of a shelf SE. This explains why, out of the total population of 4,900 SE creations, only 247 SE Works Councils have been identified.

There are over 3,220 shelf SEs across Europe, almost literally sitting on shelves waiting for another company to be subsumed under them, thereby shedding any previously existing employee participation obligations.

Returning to the envisaged 28th regime, 25 years of experience with SEs has shown that EU company forms are used systematically to circumvent national employee participation regimes. While the before-and-after principle initially seemed to provide a sufficient safeguard for existing employees' rights, combining it with freezing the status quo at the moment of creating the SE – or holding SE (see Olympus) – creates loopholes that allow companies to circumvent national stakeholder protections. This loophole is the main driver of SE creations in practice. Evidence suggests that cross-border mergers, divisions and conversions also provide ample opportunity to circumvent worker participation rights.

As was the case with the SPE and the SUP, nothing in the 28th regime proposals known so far addresses these well-documented loopholes. On the contrary, aside from current proposals that seek to exclude worker participation rights altogether (EU-Inc), what is known about the 28th regime risks making these loopholes even bigger by opening up new opportunities to weaken or circumvent workers' rights.

Conclusions and outlook

The impact of a new company framework would necessarily extend beyond company law, requiring safeguards for stakeholder rights in the areas of insolvency, taxation and labour law, among other things. Based on the evidence from the SPE/SUP debates and over two decades of SE/SCE practice, a future 28th company law regime risks repeating known pitfalls: vague eligibility criteria inviting regulatory arbitrage, the absence of worker participation safeguards (especially via shelf entities and 'freezing' effects), and insufficient space for due diligence if registration is rushed. A further concern is the facilitation of letterbox companies, which undercut labour, tax and social security obligations, incentivising forum shopping and social dumping.

Given existing tools on digitalisation and cross-border mobility, a new EU company form is not strictly necessary. If pursued, it must be narrowly scoped, enforceable across borders, and designed to safeguard stakeholder protections. Furthermore, the upcoming evaluation of the 2019 Company Mobility Package will surely yield important lessons.

Over the coming legislative cycle, the credibility of any 28th regime will turn on five tests: (i) precise, enforceable eligibility for 'innovative' firms; (ii) anti-abuse rules that block letterbox setups and shelf company gambits; (iii) dynamic worker participation safeguards that cannot be frozen or evaded, which could be achieved with the proposed horizontal framework Directive on information, consultation and participation; (iv) strong guarantees for the protection of collective bargaining rights; and (v) a company registration

process that preserves real scrutiny over speed. If early drafts fail these tests, EU policymakers can expect significant resistance from within Member States and trade unions; targeted improvements are possible without eroding workers' rights or regulatory integrity if they build on lessons derived from existing Directives, developing new instruments and ensuring robust cross-border enforcement.

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