FRENCH JOURNAL OF LEGAL POLICY

CORPORATE ASSET LOCKS: A COMPARATIVE AND EUROPEAN PERSPECTIVE

Florian ***Möslein***
Anne ***Sanders***[1]

The global debate on corporate purpose and new corporate forms includes a recent legislative reform proposal in Germany focusing on steward ownership. The proposal is part of a wider comparative trend towards the creation of long-term, purpose-driven enterprises and forms of social entrepreneurship across Europe. Steward ownership promotes the use of profits for a chosen purpose and can therefore contribute to sustainable value creation. The legislative proposal includes a permanent asset lock to ensure that profits are reinvested in the company. Shareholders can be remunerated for their work, but they cannot receive dividends or claim more than their capital in the event of liquidation. The asset lock has raised questions about its compatibility with EU law. The article argues that the asset lock is a valuable innovation in European company law and can be designed to meet the requirements of EU law. While the article concludes that the asset lock does not contradict EU law, possible restrictions may be justified. Nevertheless, the draft could be improved during the legislative process by providing for a distinct legal form, including a mission statement, and by allowing cross-border conversions into corporate forms with a comparable asset lock.

Introduction

The purpose of the corporation and new forms of business are being debated around the world. As part of this global debate, the concept of steward-ownership and its implementation is the subject of a current reform proposal in Germany. The central element of the proposal is a permanent non-distribution restriction, ie a capital or asset lock. Shareholders can be remunerated for their work for the company. However, they may not receive any dividends and, in the event of liquidation, may only claim repayment of their contribution to the company's capital. This strict commitment, which under current law can only be

1. Prof. Dr. Florian Möslein, LL.M. (London) holds the Chair of Civil Law, German and European Business Law at the Philipps University of Marburg; Prof. Dr. Anne Sanders, M. Jur. (Oxford) holds the Chair of Civil Law, Corporate Law, the Law of Family Businesses and comparative judicial studies at the University of Bielefeld. Both are part of the academic working group that presented the draft of the *GmbH-gebV* and members of the board of trustees of the *Stiftung Verantwortungseigentum e.V.* We would like to thank Lisa Beer for her valuable suggestions and Clara Gröber and Charlotte Rebmann for their editorial support.

achieved through complex, two-tier constructions, is intended to ensure that company profits are permanently used for the purpose of the company. Even though the proposal has not been adopted yet, the coalition agreement of the parties forming the current German government has promised to create such a new legal framework for steward-owned companies (*Unternehmen mit gebundenem Vermögen*).

The asset lock prohibits not only the distribution of dividends during the company's lifetime, but also the distribution of residual funds at the time of dissolution and transformation into or merger with another company not subject to the same restrictions. The latter rule against transformation into another company without an asset lock raises questions at the European level, in particular whether the asset lock is compatible with the freedom of establishment under primary law pursuant to Articles 49 and 54 TFEU and with the requirements of the Second Company Law Directive under European company law. For good reasons, the German legislator endeavours to draft laws in line with European law. It is therefore necessary to clarify whether such concerns are unfounded. However, a finding of non-compliance with European law would have implications far beyond the specific legislative proposal, as asset locks and non-distribution restrictions are widespread throughout Europe. Indeed, a comparative legal overview shows that the permanent non-distribution restriction or asset lock is not a novelty, but is remarkably widespread as a regulatory concept and – as a principle for social enterprises – even adopted by institutions of the European Union. At an even deeper level, this issue is linked to the most fundamental questions of trust and purpose in company law. The significance of the question therefore goes far beyond the German project of a new corporate form for steward-ownership, but touches on many European corporate forms designed for social entrepreneurship.

Part I of this paper examines the current trend towards new corporate forms in Europe and beyond, and the importance of non-distribution restrictions. It also introduces the German concept of steward-ownership with its characteristic asset lock. Part II examines the compatibility of the asset lock with European primary law. Part III then turns briefly to European secondary law. We argue that the asset lock is an important feature of legal innovation in Europe. When properly examined, the asset lock turns out to be compatible with the EU requirements of the fundamental freedoms and, in principle, also with the directives. In any event, it is possible to design a company with an irrevocable asset lock in a way that complies with European law, even if the legislator has to respect certain limits.

I. Asset locks and Non-distribution Constraints in Europe and Germany

1. New Corporate Forms and Non-distribution Constraints

In recent decades, there has been a growing debate about the purpose of the firm and the corporation, their design and their role in society.[2] Doubts about maximising shareholder value and the search for a more equitable, sustainable and long-term-oriented economy are at the heart of the debate and the ensuing legislative efforts. An integral part of this devel-

2. See only C. Mayer, *Prosperity* (OUP 2018); A. Edmans, *Grow the Pie: How great companies deliver both purpose and profit* (CUP 2020); J.E. Fish and S. Davidoff Salomon, 'Should Corporations Have a Purpose?' (2021) 99 Texas Law Review 1309.

opment is the rise of social entrepreneurship, which combines business methods with socially beneficial goals, blurring the formerly strict boundaries between the business and non-profit sectors.[3]

National legislators have taken different approaches to the social enterprise debate and other movements to transform business and company law.[4] Some legal systems have introduced modifications to the traditional company form, such as the US benefit corporation and the UK community interest company. There are also various forms of associations and cooperatives, particularly in Europe. In addition, certain legal systems provide special rules or qualifications that can be adopted by different legal entities, regardless of their legal form. Especially in the Nordic countries, (enterprise) foundations are used for long-term, purposeful entrepreneurship, including social entrepreneurship.[5]

Cutting across these different organisational approaches, three issues can be identified that legislators address in different ways when introducing innovative company forms and regimes:

(1) The choice of a company's purpose, which is often required to be for the benefit of society or the environment rather than to maximise shareholder value.
(2) Governance, including member or shareholder participation, directors' duties, reporting and public oversight.
(3) Financial structures, often including non-distribution restrictions and asset locks, possibly even restrictions on the distribution of assets in the event of liquidation and the possibility of transformation into another legal form.[6]

Firstly, the requirement for a beneficial purpose other than maximising shareholder value, is at the heart of many new legal forms and regimes around the world, particularly in countries where it is believed that a company's purpose is legally limited to maximising shareholder value, as in the US (1).[7] Specific rules on governance (2) are found in all legal systems and are designed to ensure accountability. As will be shown below, regulations on financial structures (3) are of particular importance in Europe. Reform efforts to promote social entrepreneurship through the introduction of special legal regimes for different forms of enterprise are now enshrined in law in 21 of the 27 Member States.[8] The promotion of

3. H. Peter, C. Vargas Vasserot and J. Alcalde Silva (eds), *The International Handbook of Social Enterprise Law* (Springer 2023); J. Defourney and M. Nyssens (eds), *Social Enterprise in Central and Eastern Europe* (Routledge 2021); Defourney and Nyssens (eds), *Social Enterprise in Western Europe* (Routledge 2021). See also D. Brakman Reiser and S.A. Dean, *Social Enterprise Law: Trust, Public Benefit and Capital Markets* (OUP 2017).
4. A. Fici, 'Models and Trends of Social Enterprise Regulation in the European Union' in H. Peter, C. Vargas Vasserot & Jaime Alcalde Silva (eds) *The International Handbook of Social Enterprise Law* (Springer 2023), 153, 159-68.
5. S. Thomsen, 'Foundation Ownership around the world' in A. Sanders and S. Thomsen (eds), *Enterprise Foundation Law in Comparative Perspective* (Intesentia 2023) 7, 11-13; M. Gawell, *Social Enterprises and their Ecosystems in Europe – Country Report Sweden* (European Commission 2019) 30; L.U. Kobo, *Social Enterprises and their Ecosystems in Europe – Country Report Norway* (European Commission 2019) 24.
6. See also A. Argyrou and T. Lambooy, 'An Introduction to Tailor-Made Legislation for Social Enterprises in the EU: A Comparison of Legal Regimes in Belgium, Greece and the UK' (2020) 25 University of Oslo Faculty of Law Legal Studies Research Paper Series.
7. This is not to deny that powerful arguments have been broad forward against that position, see for example L. Stout, *The Shareholder Value Myth* (Berrett-Koehler 2012). See for a comparative discussion F. Möslein and A.-C. Mittwoch, 'Soziales Unternehmertum im US-amerikanischen Gesellschaftsrecht: Benefit Corporation und Certified B Corporations' (2016) 80 Rabels Zeitschrift für ausländisches und internationales Privatrecht 399.
8. For a comparative overview, see Fici (n 4). See also the country reports of Defourney and Nyssens, *Central Europe* and *Western Europe* (n 3).

social entrepreneurship is on the legal policy agenda of numerous European initiatives.[9] The definition of a social enterprise adopted by the European Commission in its 2011 Social Business Initiative states that a social enterprise 'has as its main objective to have a social impact rather than to make a profit' and 'uses its profits primarily to achieve a social mission'. In its latest Action Plan for the Social Economy of 9 December 2021, the European Commission defines social enterprises as businesses whose profits are 'largely reinvested' to achieve their business objectives.[10] It is therefore likely that permanent restrictions on profit distribution will not only be in line with the law of many Member States, but will develop into a kind of (common) European principle of social enterprise law.

The regulations on financial structures are based on the traditional non-distribution restrictions of non-profit organisations[11] that act 'selflessly', eg within the meaning of § 55 (1) of the German Fiscal Code (*Abgabgenordnung, AO*). The term 'non-profit organisation' blurs this typological distinction, as it is partly understood (only) in the former sense of non-distribution of profits, but partly only refers to the narrower field of non-profit organisations.[12] The new legal forms, in contrast, aim to reconcile entrepreneurial activity with the pursuit of social objectives: while in such hybrid forms the generation of profits at the level of the company is permissible and entirely desirable, the restriction on the distribution of profits to shareholders is intended to flank the social purpose by excluding the possibility of using such company forms exclusively as an instrument for maximising the profits of shareholders.[13]

a) New Corporate Forms

aa) Benefit Corporation

The benefit corporation is probably the best known example of a new legal form that is tailored to an understanding of business that rejects pure profit orientation. The benefit corporation model has been adopted in several jurisdictions,[14] for example in Italy. The benefit corporation was first introduced in Maryland in 2010 and is now available in 36 states, including Delaware and the District of Columbia, as well as Puerto Rico. In most states, the law is based on model legislation developed by attorney William H. Clark for his client B Lab Company, a nonprofit that initiated both B Corp certification and the benefit

9. European Commission, 'Social Entrepreneurship Initiative, Communication to Parliament, Council, Economic and Social Committee and Committee of the Regions' COM (2011) 682 final, art. 2; comparable definitions can be found in Art. 3(d) of the EuSEF Regulation, as well as in Art. 2(1) of Regulation (EU) 1296/2013 establishing a European Union Programme for Employment and Social Innovation (EaSI) [2013] OJ L 347/238.
10. European Commission, 'Building an Economy of Service: An Action Plan for the Social Economy, Communication to the Parliament, the Council, the Economic and Social Committee and the Committee of the Regions' COM (2021) 778 final, 4.
11. H. Hansmann, 'The Role of Nonprofit Enterprises' (1980) 89 Yale Law Journal 835: 'A nonprofit organization is, in essence, an organization that is barred from distributing its net earnings, if any, to individuals who exercise control over it, such as members, officers, directors, or trustees.'
12. For more details, see T. von Hippel, *Grundprobleme von Nonprofit-Organisationen* (Mohr Siebeck 2007) 14-47.
13. F. Möslein, *Reformperspektiven im Recht sozialen Unternehmertums* (2017) 50 Zeitschrift für Rechtspolitik 175, 177; Möslein and Mittwoch (n 7).
14. See the contributions in part III of Peter, Vargas Vasserot and Silva (n 3); Defourney and Nyssens, *Central Europe* and *Western Europe* (n 3).

corporation as a special legal form.[15] In addition to incorporating as a benefit corporation, businesses can demonstrate their commitment to responsible and sustainable entrepreneurship and seek certification from B Lab.[16]

All of the different benefit corporation regimes require a benefit corporation to have at least one social or environmental purpose, as described in question (1) above. Different regimes in different countries list different possible purposes. The Model Legislation requires a benefit corporation to have a purpose of 'creating public benefit'[17] which is defined as a 'material positive impact on society and the environment, taken as a whole, assessed against a third-party standard, from the business and operations'.[18]

The model legislation sets out duties and procedures to underpin and enforce the company's commitment to its chosen public benefit, addressing point (2) above. There are corresponding duties on directors to balance the pursuit of purpose and profit, and reporting duties to publish an annual benefit report. In addition, the Model Law requires a benefit corporation to have a benefit director, an independent person[19] who should provide an opinion as to whether the corporation and its directors have acted in accordance with its purpose.[20]

However, the lack of an effective enforcement mechanism for beneficial purposes is criticized as an obstacle to the development of public trust.[21] For example, the right to sue for breach of the public benefit obligation is limited to shareholders and the company itself. This is seen as inefficient, as shareholders and the board are unlikely to demand that a public purpose be pursued at the expense of profits.[22] Although it is a legal requirement, in most states only 8-14% file their report.[23]

In addition, the commitment to the public purpose of a benefit corporation can always be abandoned later,[24] which is often the case as companies scale up, as Emilie Aguirre has shown, using the case of Etsy as an example.[25] She suggested the formation of a diverse

15. See for a comparative perspective only H. Fleischer, 'Die US-amerikanische Benefit Corporation als Referenz– und Vorzeigemodell im Recht der Sozialunternehmen' (2023) AG 1, 2; Möslein and Mittwoch (n 7); S.J. Shackelford, J. Hiller and X. Ma, 'Unpacking the Rise of the Benefit Corporation: A Transatlantic Comparative Case Study' (2020) 60 Virginia Journal of International Law 697; for the US American perspective see only M.J. Loewenstein, 'Benefit Corporation Law' (2017) 85 University of Cincinnati Law Review 381; J. Haskell Murray, 'Social Enterprise Innovation: Delaware's Public Benefit Corporation Law' (2014) 4 Harvard Business Law Review 345; D. Brakman Reiser and S.A. Dean, 'Financing the Benefit Corporation' (2017) 40 Seattle University Law Review 793.
16. <https://www.bcorporation.net/en-us/> accessed 1 February 2023.
17. Model Benefit Corporation Legislation, section 201(a).
18. Model Benefit Corporation Legislation, section 102.
19. As defined in Model Benefit Corporation Legislation, section 102.
20. Model Benefit Corporation Legislation, section 302.
21. J. Haskell Murray (n 15); Z. Needle, 'Who Will Watch the Watchers?: Enacting a Corporate Observing Board to Increase Consideration of Stakeholder Interests' (2020) 89 Fordham Law Review 763; E. Aguirre, 'Beyond Profit' (2021) 54 University California Davis Law Review 2077-148, 2087-98.
22. M. Verheyden, 'Public Reporting by Benefit Corporations: Importance, Compliance, and Recommendations' (2011) 14 Hastings Business Law Journal 56; D. Brakman Reiser, 'Benefit Corporation – A sustainable form of organization?' (2011) 46 Wake Forest Law Review 613.
23. J. Haskell Murray, 'An Early Report on Benefit Reports' (2015) 118 West Virginia Law Review 50 and 52 (Table A: Benefit Reporting Data); Verheyden (n 22) 104 Appendix II-V.
24. See Model Legislation § 105(a) according to which a vote with a 2/3 majority is required; Cal. Corp. Code §§ 14604(a); NJ Rev Stat §§ 14A:18-4; MD Corp & Assn Code § 5-6C-04. See also Katz/Page, 'Sustainable Business' (2013) 4 Emory Law Journal 851, 865ff; F. Möslein and A.-C. Mittwoch, 'Welche Rechtsform für verantwortliches Unternehmertum?' (*Frankfurter Allgemeine Einspruch*, 8 Dec 2020); B. Momberger, *Social Entrepreneurship – im Spannungsfeld zwischen Gesellschafts– und Gemeinnützigkeitsrecht* (Bucerius Law School Press 2015) 250ff.
25. Aguirre (n 21) 2077-148, 2079-80, 2087-98.

board with worker representation and socially conscious executive compensation as tools to achieve long-term commitment to public purpose.[26] So far, however, Connecticut is the only state that has introduced a so-called 'preservation clause' that prevents a benefit corporation from being converted into a regular corporation.[27]

In summary, the benefit corporation combines rules for purpose selection (1) with certain, albeit limited, governance tools, but lacks (2) restrictions on profit distribution and (3) transformation. The benefit corporation is designed to combine the pursuit of profit with the pursuit of a good purpose. This characteristic combination of profit and 'good' purpose raises the challenge of how to ensure that purpose is not abandoned in the interest of profit. Liptrap argued (with reference to the UK Community Interest Company) that this 'legacy problem'[28] is the natural consequence of combining two different logics, the logic of acting for the public good and the logic of profit, in one legal form. The benefit corporation does not solve this problem, but leaves it to the discretion of shareholders and management.

bb) Other European Corporate Forms

In the UK (Community Interest Company, CIC) and Belgium (*Vennootschap meet Sociaal Og-merk, VSO*),[29] special forms of company law have been developed for social enterprises. They require the pursuit of a social purpose (1) and impose certain governance instruments, including reporting requirements and supervision (2). However, they all impose significant restrictions on the distribution of profits (3).

The UK community interest company,[30] introduced by the Companies (Audit, Investigations and Community Enterprise) Act 2004,[31] can only distribute 35% of its profits. It cannot change its form. In the event of liquidation, shareholders can only claim back their initial investment, while any remaining profits must be given to another social enterprise.[32] It is important to note, however, that many community interest companies do not distribute any profits at all. According to the UK 2021 Social Enterprise Survey, most social enterprises in the UK are registered as either companies limited by guarantee (28%) or community interest companies limited by guarantee (21%). Only 8% are clearly community interest companies limited by shares.[33] Companies limited by guarantee are used not only in the UK but also in Ireland.[34] Companies limited by guarantee are usually set up for charitable purposes. Such a company has no shareholders, but members who are only potentially liable for the amount they have 'guaranteed' to pay, usually £1. Profits are not usually distributable, but must be ploughed back into the company itself for such purposes as are

26. ibid 2077-48, 2079-80, 2116-30; G.M. Hayden and M.T. Boodie, *Reconstructing the Corporation* (CUP 2020) 161ff.also suggest including employees on the corporate board.
27. B. Morgan, 'Transcending the Corporation' in T. Clarke, J. O´Brien, C.R.T. O´Kelley (eds), *The Oxford Handbook of the Corporation* (OUP 2019) 667-686; <https://ctnewsjunkie.com/2014/10/01/social_entrepreneurs_celebrate_new_corporate_structure/> accessed 1 February 2023).
28. J.S. Liptrap, 'The Social Enterprise Company in Europe: Policy and Theory' (2020) 20 Journal of Corporate Law Studies 495, 519ff.
29. Argyrou and Lambooy (n 6). The VOS was discontinued in 2019.
30. J.S. Liptrap, 'British Social enterprise law' (2021) 21 J. Corp. Law Stud. 595; N. Boeger, S. Burgess and J. Ellison, 'Lessons from the Community Interest Company' in N. Boeger and C. Villiers (eds), *Shaping Corporate Landscape: Towards Corporate Reform and Enterprise Diversity* (Hart Publishing 2018) 347-64; Momberger (n 24) 242ff.
31. <https://www.legislation.gov.uk/ukpga/2004/27/contents> accessed 1 February 2023.
32. CiC Regulation 2005, ref. 23.
33. Social Enterprise UK, Not Going Back – State of Social Enterprise Survey (2021) 12.
34. M. O'Shaugnessy, *Social Enterprises and their Ecosystems in Europe – Country Report Ireland* (European Commission 2020) 26-27; F. Lyon, B. Stumbitz and I. Vickers, *Social Enterprises and their Ecosystems in Europe – Country Report United Kingdom* (European Commission 2019) 23-28.

specified in its constitutional document.[35] For this reason, the company limited by guarantee is sometimes referred to on the internet as a 'foundation company'.[36] However, companies limited by guarantee do not have an asset lock per se, but usually provide for one in their articles of association.

The Latvian legislator has created a special status, not a special form of company, which will therefore be discussed below. However, only limited liability companies can obtain this status.[37] Under this status, the distribution of profits is completely prohibited in Latvia; profits must be reinvested or used to achieve the social purpose.[38] In case of liquidation and transformation, according to Article 11, it seems to lose its social enterprise status; the status can only be kept in case of a merger with another social enterprise. The Belgian VOS limits the profits to be distributed to a certain official rate of return on the investment; in 2015 this was 6%.[39] In the event of liquidation, any surplus remaining after payment of debts had to be used for social purposes close to those of the VOS.

Thus, these company law forms not only contain rules on purpose (1) and governance (2), but also impose strict limits on the distribution of profits during the life of the company and on liquidation in category (3). The community interest company also explicitly blocks transformation; Belgian law is less clear in this respect.

A very interesting, albeit rare,[40] form is the Swedish *aktiebolag med vinstutdelningsbegränsning* (limited liability company with restricted distribution of profits), which was introduced by a law in 2005 and came into force in 2006 and is regulated in Chapter 32 of the *aktiebolagslagen* (Companies Act).[41] An *aktiebolag med vinstutdelningsbegränsning* must indicate its legal form by adding the letters svb to its name (§§ 17, 18). The law does not require that a charitable purpose be pursued (point a), but it does require special management (b) and a strict asset lock (c). The company form was intended for activities that were previously carried out under public auspices, for example in the health sector.[42] The rules are designed to ensure that the majority of the company's profits remain within the company.[43]

The distribution of profits is limited to a low, fixed rate of interest (§ 5). The company must have at least one auditor, who must check the annual report on the financial situation, including loans (§§ 3, 4). The asset lock is irreversible (§ 15) and also prohibits transformation (§§ 11-12a). A merger or division of such a company is only possible if the acquiring company is of the same type. With a new law that came into force on 31 January 2023, the Swedish legislator has excluded cross-border transformations of this limited liability company (§ 12a), which are regulated for other limited liability companies in Chapter 34a of the Companies Act.

35. O'Shaughnessy (n 34) 26-27.
36. <https://www.easy-limited.de/infothek/stiftungs-limited-company-limited-by-guarantee> accessed 1 February 2023 – 'Stiftungs GmbH'.
37. Fici (n 4). 169, 166. 160, 166.
38. Fici (n 4). 160, 166.
39. Y. Sebbarh, *The Belgian Social Purpose Company: Maintain, Adjust or Abandon?* LLM Thesis (Catholic University of Leuven 2017) 65 <chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://6emesconf.exordo.com/files/papers/56/final_draft/YounesSebbarh-Thesis-Arial.pdf>.
40. According to the Swedish registration office, there are roughly 190. See also Gawell (n 5) 30.
41. For the governmental proposal see Regeringens proposition 2004/05:178, for the law see <https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/aktiebolagslag-2005551_sfs-2005-551#K32> accessed 1 February 2023.
42. Pestoff, *A Democratic Architecture for the Welfare State* (Routledge 2009); Gawell (n 5) 22-23.
43. Information of the Swedish Companies Registration Office <https://bolagsverket.se/foretag/aktiebolag/startaaktiebolag/aktiebolagmedvinstutdelningsbegransning.531.html> accessed 1 February 2023.

The law also contains rules on the preservation of assets in the event of liquidation (§ 13). Any surplus remaining, after the debts have been paid and the shareholders have been repaid their investment in their shares, must be paid to another limited liability company or companies with a special profit distribution restriction specified in the articles of association. If the articles of association do not provide for such a recipient, the assets go to the general inheritance fund (§ 14).

In summary, the Swedish *aktiebolag med vinstutdelningsbegränsning* combines a broad approach to the purpose of the company (1) with a strict asset lock, even excluding cross-border conversions (3), and governance that preserves the asset lock (2).

b) Cooperatives and Associations

The company law form has lost importance for social enterprises in the EU: the UK is no longer a member of the EU, and the VOS was abolished in 2019, when Belgian company law and the law on associations were reformed and simplified.[44] In Belgium, it is now possible for associations and cooperatives to use the legal forms of the association *sans but lucratif* or cooperative accredited as social enterprise. Such associations are allowed to carry out commercial activities. The only difference between an association and a company is now the absolute prohibition to distribute dividends or to grant advantages to its members or directors.[45] Thus, the asset lock of the association seems to be even stricter than that of the VOS. On the European level, the draft proposal for a European cross border association of September 5th 2023 (2023/0315) must be mentioned. The draft does not forbid the association to make profits but includes a full asset lock.

The cooperative movement has been described as the origin of social entrepreneurship in Europe.[46] Fici describes it as the 'ideal model' and the most common legal form for a social enterprise, with regulations in Croatia, the Czech Republic, France, Greece, Hungary, Italy, Poland, Portugal and Spain.[47] The traditional cooperative purpose of supporting its members has been opened up to more social objectives. Today, the social cooperative combines specific participatory, ie democratic governance rules (2), with the requirement to pursue charitable purposes (1) and, in most cases, financial rules limiting or prohibiting the distribution of profits (3).[48] An example is the Greek social cooperative (koinsep): 60% of its profits must be reinvested, 5% allocated to the reserve, and 35% paid out as productivity bonuses to employees. After liquidation, the remaining funds must be transferred to the Social Economy Fund.[49]

c) Labels

Rather than creating tailor-made special legal forms, many legislators across Europe are developing legal frameworks or certificates that can be adopted by different corporate forms

44. M. Nyssens and B. Huybrechts, 'Social Enterprises in their Ecosystems in Europe' in *Country Report Belgium* (European Commission 2020) 41.
45. <https://www.eylaw.be/2019/02/28/approval-of-the-new-belgian-code-on-companies-and-associations/> accessed 1 February 2023.
46. D Hernández Cácaerez, 'Social Enterprises in Social Cooperative Form' in H. Peter, C. Vargas Vasserot & Jaime Alcalde Silva, *The International Handbook of Social Enterprise Law* (Springer 2023) 173.
47. Fici (n 4) 160.
48. Hernández Cácaerez (n 46). Table 3, 183.
49. Argyrou and Lambooy (n 6) 95-97; Hernández Cácaerez (n 46) Table 3, 183.

to achieve the status of a socially responsible enterprise or social enterprise.[50] Examples can be found in Bulgaria, Cyprus, Denmark, Finland, France, Greece, Italy, Latvia, Lithuania, Luxembourg, Malta, Poland, Romania, Slovakia, Slovenia and Spain.[51]

The French *société à mission* was introduced in 2019 and follows a different approach, outside the field of social entrepreneurship.[52] Like the other examples in this section, it is not a specific legal form but is open to all companies that want to commit themselves to a *raison d'être,* a purpose that must include at least one social or environmental objective. If this approach is chosen, the company must earmark funds to pursue this purpose, and it must establish a special body within the company to oversee the fulfilment of the mission. At least one member of this body must be an employee. The *société à mission* thus combines rules on the corporate purpose (1) with governance tools that can be described as more robust than those of the benefit corporation (2). However, it has no restrictions on profit distribution or transformations (3).

For social enterprises, such labels ensure that the social enterprise identity is maintained across different legal forms.[53] Achieving the desired status requires a commitment to a purpose that benefits the public (1), and requires governance tools including reporting and public oversight (2).[54] In addition, legislation often limits the profits that can be distributed to shareholders and members during and after the life cycle of the social enterprise (3). Given the definitions at the European level already mentioned, such asset locks are seen as a crucial feature of social enterprises in Europe.[55] Such rules are important not only during the operation of a social enterprise, but also in the event of liquidation, transformation or, in this case, de-registration. In the absence of such rules, shareholders or members could simply leave the scheme, become a for-profit company again and take possession of the assets acquired during the time as a social enterprise, thereby rendering the asset lock at registration essentially meaningless, thereby disappointing the trust of various stakeholders.[56]

An example is the Danish *registrerede socialøkonomiske virksomheder,*[57] which can only distribute 35% of its profits during its lifetime and in the event of liquidation.[58] In France,

50. On these two regulatory approaches, see, for example, A. Fici, 'Recognition and Legal Forms of Social Enterprise' (2016) 27 European Business Law Review 639, 662-67; K. Engsig Sørensen and M. Neville, 'Social Enterprises: How should company law balance Flexibility and Credibility?' (2014) 15 European Business Organization Law Review 267, 279-85; Möslein (n 13) 175, 177.
51. For a comparative law overview, see Fici (n 4) 153, 165 See also the country reports in: Defourney and Nyssens, *Central Europe* and *Western Europe* (n 3).
52. B. Segrestin, A. Hatchuel and K. Levillain, 'When the Law Distinguishes Between the Enterprise and the Corporation: The Case of the New French Law on Corporate Purpose' (2021) 171 Journal of Business Ethics 1-13 <https://doi.org/10.1007/s10551-020-04439-y>; I.M. Barsan and M. Hertslet, 'Unternehmensinteresse, Gesellschaftszweck und Corporate Social Responsibility – Neuere Entwicklungen im französischen Gesellschaftsrecht' (2019) 4 Zeitschrift für Internationales Wirtschaftsrecht 256.
53. Fici (n 4). 153, 165-66.
54. In case of Poland, eg the wojewoda, local government agents (Article 10-20) and an advisory body with employees (Article 7), see Ustawa, z dnia 5 sierpnia 2022 r.o ekonomii społecznej (Act on the social economy) Art. 10-13 <https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20220001812/T/D20221812L.pdf> accessed 1 February 2023.
55. C. Bolzaga and others, *Social Enterprises in their Ecosystems in Europe, Comparative Synthesis Report* (European Commission 2020) 31, 160-61: definition.
56. Sørensen and Neville (n 50) 303-04.
57. See for the law in Danish <https://www.retsinformation.dk/eli/lta/2014/711> accessed 1 February 2023. See also Sørensen and Neville (n 50) 298-303; J.S. Liptrap 'A More Socio-Environmentally Responsive Way to Organise the Firm? A Case Study on Danish Social Entrprise Law' 19 European Company and Financial Law Review, 2022. 517.
58. See for the 'protective mechanisms' under Danish law JLiptrap (n 57).

under the regime of the *entreprise solidaire d'utilité sociale* (ESS),[59] most profits must be used for its purpose and mandatory reserves must be created. Such reserves must not be distributed but 50% may be incorporated to increase shares or distribute bonus shares. In case of transformation or liquidation, the property and capital must be transferred to another social enterprise. Like a company under the French ESS-regime, the Luxembourg *société d'impact sociétal*[60] may distribute up to 50% of its profits and must transfer its assets to a social enterprise with a similar purpose in the event of a merger or liquidation. However, if it has only non-performing shares, no dividends are paid. The Romanian *întreprinderil sociale*[61] may distribute only 10% of profits. In the event of liquidation and deregistration, the French,[62] Luxembourg[63] and Romanian[64] schemes require the assets to be transferred to another social enterprise. In Slovenia[65] and Poland,[66] no distribution of profits is allowed at all, bringing the asset lock to 100%.

In the case of conversion or liquidation, there appear to be many provisions to ensure that the asset lock is maintained, particularly in that the assets in question can only be transferred to other organisations with the same or similar objectives.

d) Foundations

Foundations, including enterprise foundations, have a long tradition, especially in the Nordic countries, as a legal form for long-term businesses in general. If a foundation runs an enterprise or, more often, holds shares in a company that runs an enterprise, it can be called an enterprise foundation.[67] A foundation has no shareholders or members, it exits only to fulfil the purpose set out by its founder. Its governance depends on the legal system, but it is usually supervised by a public authority. The purpose of a foundation is usually set in perpetuity, and its implementation is usually more or less supervised by a special public body. As a foundation has neither shareholders nor members, it cannot distribute profits to them, thereby securing a complete asset lock. Transformations into another form are not considered possible.[68] Thus, enterprise foundations fulfil all the elements of a fixed purpose (1), governance (2), and asset lock (3).

59. Loi 2014-856 du 31 juillet 2014 relative à l'économie sociale et solidaire <https://www.legifrance.gouv.fr/loda/id/JORFTEXT000029313296/> accessed 1 February 2023; Liptrap (n 28) 495-96.
60. Loi du 12 décembre 2016 portant creation des sociétés d'impact sociétal <https://data.legilux.public.lu/file/eli-etat-leg-loi-2016-12-12-n1-jo-fr-html.html> accessed 1 February 2023; Yeo, 'New type of Company on the block' (2017) KPMG Luxembourg <https://www.mondaq.com/corporate-and-company-law/565984/new-type-of-company-on-the-block-socit-d39impact-socital> accessed 1 February 2023.
61. Lege No. 219 din 23 iulie 2015 privind economia socială <http://legislatie.just.ro/Public/DetaliiDocument/170086> accessed 1 February 2023.
62. Loi 2014-856 du 31 juillet 2014 relative à l'économie sociale et solidaire, Article 1 Nr. 3 b).
63. Loi du 12 décembre 2016 portant creation des sociétés d'impact sociétal (n 60), Article 11 (2).
64. Lege No. 219 din 23 iulie 2015 privind economia socială (n 61) Article 8 (4) (c).
65. C. Vargas. Vasserot, 'Legal Regulation of Social Enterprises in other European Countries' in (H. Peter, C. Vargas Vasserot & Jaime Alcalde Silva *The International Handbook of Social Enterprise Law* (Springer 2023) 942-43.
66. See Ustawa, z dnia 5 sierpnia 2022 r.o ekonomii społecznej (Act on the social economy) Art. 9 <https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20220001812/T/D20221812L.pdf> accessed 1 February 2023.
67. Thomsen (n 5) 7, 11-13. See also S. Thomsen, *The Danish Industrial Foundation* (DJOF Publishing 2017).
68. See with comparative overview A. Sanders and S. Thomsen, 'Enterprise Foundation Law in a Comparative Perspective: Concluding Observations' in *Enterprise Foundation Law in Comparative Perspective* (Intersentia 2023) 221-45.

e) Comparative Summary

This comparative survey has shown that not only purpose orientation and governance rules, but also asset locks, non-distribution restrictions, and rules on transformation are common in different legal forms and regimes for purpose-oriented businesses, especially social entrepreneurship. As required by European definitions of social enterprises, such rules ensure that profits are used to pursue the chosen purpose and are not distributed to shareholders and members. Rules on liquidation and transformation ensure that this treatment of profits cannot be abandoned at the time of liquidation or transformation.

2. The Concept of Steward-Ownership

Germany does not yet have a specific legal regime for social enterprises, although existing company, foundation and cooperative law is often used for this purpose. Steward-ownership is a concept that goes beyond social entrepreneurship, although the legal regime it advocates could be used by social enterprises and other businesses. It combines a strict asset lock with an open approach to purpose. Governance rules are also seen as an important element for ensuring that the asset lock is respected. However, these rules are not the focus of the present discussion.

The concept of steward-ownership –[69] *Verantwortungseigentum*, *Unternehmen mit gebundenem Vermögen* or *treuhänderisches Unternehmertum* in German –[70] was developed by a group of entrepreneurs who have joined forces in the *Stiftung Verantwortungseigentum e.V.*[71] The coalition agreement between the Social Democratic Party (*SPD*), the Green Party (*Bündnis 90/Die Grünen*) and the Liberal Party (*FDP*) of 24 November 2021 provides for the creation of a new, suitable legal basis for steward-ownership.[72] A group of academics, including the authors of this article, has drawn up a much-discussed draft law to provide the legislators with food for thought.[73]

69. A. Sanders, 'Binding Capital to Free Purpose', 19 European Company and Financial Law Review, 2022, 662; A. Sanders, 'Vermögensbindung und "Verantwortungseigentum" im Entwurf einer GmbH mit gebundenem Vermögen' (2021) 24 Neue Zeitschrift für Gesellschaftsrecht 1573.
70. In German, *Verantwortungseigentum* means 'responsibility ownership'. This term was supposed to underline the responsibility steward-owners bear for the businesses in question even though they do not own the business financially. However, since this term can be misunderstood as claiming that responsible business ownership was only possible in this form, it is not used in the draft law anymore.
71. <www.stiftung-verantwortungseigentum.de>; for English information <www.purpose-economy.org>.
72. See Coalition Agreement 2021-2025 between SPD, Bündnis 90/Die Grünen, and FDP, p. 30, <https://www.bundesregierung.de/resource/blob/974430/1990812/04221173eef9a6720059cc353d759a2b/2021-12-10-koav2021-data.pdf?download=1> accessed 1 February 2023.
73. A. Arnold and others, 'Die GmbH im Verantwortungseigentum – eine Kritik' (2020) 23 NZG 1321; A. Arnold and others, 'Stellungnahme zum Vorschlag einer GmbH "in Verantwortungseigentum"' (2020) 18 Zeitschrift für Stiftungs– und Vereinswesen 201; H.-J. Fischer and K. Fischer, 'Die GmbH in Verantwortungseigentum (VE-GmbH) im Rahmen der Umsetzung globaler Nachhaltigkeitsziele – eine mögliche neue Rechtsform für den Mittelstand' (2022) 75 Betriebs-Berater 2122; B. Grunewald and J. Hennrichs, 'Die GmbH in Verantwortungseigentum, wäre das ein Fortschritt?' (2020) 23 NZG 1201; M. Habersack, '"Gesellschaft mit beschränkter Haftung in Verantwortungseigentum" – ein Fremdkörper im Recht der Körperschaften' (2020) 111 GmbH-Rundschau 992; O. von Homeyer and M. Reiff, 'Verantwortungseigentum ante portas? – Erste Betrachtungen einer weitreichenden Idee' (2020) 12 Zeitschrift für das Recht der Non Profit Organisationen 224; R. Hüttemann, P. Rawert and B. Weitemeyer, 'Zauberwort "Verantwortungseigentum"' (*Frankfurter Allgemeine Zeitung*, 6 Nov 2002); M. Reiff, 'Entwurf eines Gesetzes für die GmbH in Verantwortungseigentum (VE-GmbH) vorgelegt' (2020) 41 Zeitschrift Wirtschaftsrecht 1750; J. Vetter and T. Lauterbach, 'Bedarf es gesetzlicher Regelungen für Gesellschaften in Verantwortungseigentum?' in B. Dauner-Lieb and others (eds) *Festschrift für Grunewald* (Otto Schmidt ➤

Entrepreneurs who follow this concept see themselves as stewards of their voting rights for the next generation.[74] Profits which shareholders usually receive through dividends or on liquidation should remain in the company to be reinvested or donated. In this way, profits serve the objectives of long-term entrepreneurship and the purpose of the company.[75] Steward-owned businesses should not be sold for profit but remain independent.

a) Asset Lock

The core of the concept is the permanent asset lock: shareholders contribute to the capital of the company and can be remunerated for their work for the company. Shareholders do not receive any dividends and, in the event of liquidation, can only claim repayment of their contribution to the company's capital. However, unlike the UK community interest company and the Swedish *aktiebolag med vinstutdelningsbegränsning*, there are no restrictions on interest payments and bonuses to employees, other than that the company may not pay more than the normal market rate.

2021) 1199; B. Weitemeyer, 'Unternehmen in Verantwortungseigentum? Zur Zulässigkeit der Selbstbeschränkung und Unveräußerlichkeit im Stiftungs– und Gesellschaftsrecht' in S. Grundmann, H. Merkt and P. Mülbert (eds) *Festschrift für Hopt* (De Gruyter 2020) 1419; B. Lomfeld and N. Neitzel, 'Verantwortungseigentum! Der Gesetzesentwurf zur GmbH mit gebundenem Vermögen' (*Verfassungsblog*, 13 March 2021) <https://verfassungsblog.de/verantwortungseigentum/>; U. Burgard, 'Verantwortungseigentum in Stiftungsform de lege lata und de lege ferenda' (2021) 19 ZStV 1; Sanders (n 69) 1573; W. Servatius, 'Verantwortungseigentum – in dubio Gesellschaftsrecht!' (2021) 24 NZG 569; L. Strohn, 'Schutz der Menschenrechte durch das Sorgfaltspflichtengesetz' (2021) 185 Zeitschrift für das Gesamte Handels– und Wirtschaftsrecht 629; B. Weitemeyer, B.E. Weißenberger and G.T. Wiese, 'Eine GmbH mit ewigem Gewinnausschüttungsverbot, Bahnbrechende Innovation oder volkswirtschaftlich bedenkliche Perpetuierung?' (2021) 112 GmbHR 1069; G. Rabea Rolfes and S. Berisha, 'Der Schutz der Gläubiger des Gesellschafters einer GmbH mit gebundenem Vermögen' (2022) 113 GmbHR 23; H. Fleischer, 'Ein Schönheitswettbewerb für eine neue Gesellschaftsform mit Nachhaltigkeitsbezug: Zur rechtspolitischen Diskussion um eine GmbH mit gebundenem Vermögen' (2022) 43 ZIP 345; A. Engel and D. Haubner, 'Die GmbH mit gebundenem Vermögen und das Europarecht' (2022) 60 Deutsches Steuerrecht 844; J.-E. Schirmer, 'Nachhaltigkeit via Gesellschaftsform: Europäische Lektionen für die GmbH mit gebundenem Vermögen' 31 Zeitschrift für Europäisches Privatrecht (15 Dec 2022) (unpublished manuscript <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4289719> accessed 1 February 2023). On tax law: S. Kempny, 'Die "GmbH mit gebundenem Vermögen" ist kein "Steuersparmodell"– Terminologische und ertragsteuersystematische Bemerkungen – Zugleich Erwiderung auf Hüttemann/Schön' (2021) 25 Der Betrieb 1356 & 39 DB 2248; S. Kempny, 'Steuerrechtliche Gesichtspunkte im Entwurf einer GmbH mit gebundenem Vermögen' (2021) 74 DB 25; R. Hüttemann and W. Schön, Die '"GmbH mit gebundenem Vermögen" – ein Steuersparmodell?!' (2021) 74 DB 1356; C. Watrin and F. Riegler, '"Gesellschaft mit beschränkter Haftung mit gebundenem Vermögen" – Würdigung der vorgeschlagenen Anpassungen des KStG und des ErbStG' (2021) 103 FR 350; a current bibliography can be found here Literatur – Universität Bielefeld (uni-bielefeld.de) <https://www.uni-bielefeld.de/fakultaeten/rechtswissenschaft/ls/sanders/verantwortungseigentum/literatur-1/> accessed 1 February 2023.

74. 'Was heißt Verantwortungseigentum?', <https://stiftung-verantwortungseigentum.de/verantwortungseigentum> accessed 1 February 2023.
75. R.Schmidt and G. Spindler, 'Shareholder Value zwischen Ökonomie und Recht' in H.-D. Assmann and others (eds) *Freundesgabe für Friedrich Kübler* (CF Müller 1997) 515; P.O. Mülbert, 'Shareholder Value aus rechtlicher Sicht' (1997) Zeitschrift für Unternehmens– und Gesellschaftsrecht 129; A.V. Werder, 'Shareholder Value-Ansatz als (einzige) Richtschnur des Vorstandshandelns?' (1998) ZGR 69; H. Fleischer, 'Shareholder vs. Stakeholder: Ökonomische Fragen' in P. Hommelhoff, K.J. Hopt and A.V. Werder (eds) *Handbuch Corporate Governance* (Schaffer Poeschel 2010) 185; R.H. Schmidt and M. Weiß, 'Shareholder vs. Stakeholder: Aktienrechtliche Fragen' in P. Hommelhoff, K.J. Hopt and A.V. Werder (eds) *Handbuch Corporate Governance* (Schaffer Poeschel 2010) 161; H. Poeschl, *Strategische Unternehmensführung zwischen Shareholder-Value und Stakeholder-Value* (Springer Gabler 2010).

The concept builds on the tradition of family businesses, where family members see themselves as trustees for the next generation.[76] While this approach is rooted in the tradition of family businesses, steward-owners want to achieve the same commitment through legal rules in a family not of blood but of values. Another inspiration is the Nordic tradition of enterprise foundations discussed above. However, unlike a foundation with directors who are obliged to fulfil the wishes of the founder, steward-owners are free to develop the business as they wish.

There are also several differences between steward-ownership and the new legal forms for dual purpose enterprises, such as the US benefit corporation, and social enterprises. Two key differences are highlighted here:

- First, while benefit corporations combine purpose and profit for their shareholders, and some social enterprises may distribute some profits, steward-owned enterprises focus solely on their purpose.[77]
- Second, unlike most of the forms discussed above, there are no requirements as to the purpose of a steward-owned enterprise. It may aim to create social and environmental benefits, like a social enterprise, or it may simply aim to provide a useful product or service to its customers.

While there are obvious parallels with the concept of social entrepreneurship, there is an important difference in that steward-ownership does not limit the purpose of the organisation. The concept of steward-ownership does not require a value judgement as to what is a 'good' purpose, but it rather provides a framework for the long-term direction of the business structure. Within this structure, the managers of the company should be allowed to pursue the (legitimate) purpose they consider important. It could be a social or environmental purpose, as required for a social enterprise, or it could be something else, theoretically including the production of weapons. The proponents argue that, as long as society needs weapons for the police force and army, someone will have to produce them, and that it is preferable for such an entrepreneur to operate in a corporate form without the pressures of maximizing shareholder value. While there are therefore important differences in purpose, the asset lock serves comparable goals for steward-ownership and social entrepreneurship: Business decisions are not made to create private wealth for shareholders, but for reasons related to the purpose of the enterprise. As in a social enterprise, the irreversibility of the asset lock guarantees that various stakeholders, such as customers and employees, can trust that profits will be reinvested or donated rather than used for private wealth creation.

For example, these characteristics are an important element of the business model of a search engine like Ecosia. It becomes more valuable with each customer's search. The asset lock guarantees that their contribution will not be used to make the founder, Christian Kroll, a millionaire by selling his business to Google. Another important aspect of steward-ownership is the cross-generational approach. Steward-owners run the business for the next generation, and the asset lock ensures that future generations adhere to the same principle. For example, a business owner who wants an employee to develop the business she has built may be willing to give it away, but probably not to allow the new owner to sell it and move to the south of France with the wealth built up by previous generations.

76. S. Kalss and S. Probst, *Familienunternehmen– Gesellschafts– und Zivilrechtliche Fragen* (Manz 2013) para 2-27; G. Krämer, *Sonderrecht der Familiengesellschaften* (Nomos 2019) 116ff; B. Felden, A. Hack and C. Hoon, *Management von Familienunternehmen* (2nd edn, Springler Gabler 2019) 18.
77. About the concept: <https://stiftung-verantwortungseigentum.de/fileadmin/user_upload/booklet/sve_booklet_digital.pdf>; <https://purpose-economy.org/content/uploads/purpose_book_de.pdf>.

b) The Draft Law

At present, steward-owned businesses use complicated structures which include foundations and limited companies to create the irreversible asset lock.[78] But entrepreneurs are calling for a simpler, more tailored corporate solution. Already before the last election in 2021, a group of academics, including the authors, drafted a proposal for the implementation of steward-ownership in German company law. In order to make the introduction as simple as possible, the group proposed the introduction as a variant of the German limited company, the GmbH.[79] However, the draft suggests that there may be advantages to introducing an entirely separate corporate form.

The draft law includes rules prohibiting the direct and indirect distribution of profits to its shareholders and governance rules to ensure that the asset lock is respected. It also requires that in the event of liquidation, after all debts have been paid and shareholders have been repaid their deposit, the remaining assets must be transferred to another steward-owned company or to a not-for-profit organisation with a complete asset lock. Furthermore, the draft excludes the conversion of such a steward-owned GmbH into other legal forms without asset lock; mergers are only possible with another steward-owned GmbH or as an acquiring legal entity.

In the absence of these provisions, the asset lock could be removed by conversion into or merger with another legal form without asset lock. For example, the employee mentioned above who received the shares in the company as a gift could convert it into a limited company under another legal regime without an asset lock and sell the company for his own profit. This risk would make the entrepreneur think twice before making the gift. As soon as such conversion possibilities exist, the promise made by the asset lock drastically loses credibility, regardless of whether the conversion takes place domestically or across borders with the participation of foreign legal entities. The central demand of the entrepreneurs represented by the *Stiftung Verantwortungseigentum e.V.*, namely to be able to legally secure the ownership of assets in the long term, can therefore only be achieved with a corresponding restriction of the possibilities for conversion, like those drafted by some European legislators for their new corporate forms and regimes. However, restrictions on cross-border company transactions naturally raise questions of European law, in particular with regard to their compatibility with the freedom of establishment under Articles 49 and 54 TFEU.[80]

II. Compliance with EU Treaty Law (in particular: Freedom of Establishment)

So far, there is no indication that the European Court of Justice (ECJ) might criticize the widespread rules on corporate asset locks or the corresponding restrictions on conversions and liquidations as being contrary to European law. No such concerns appear to have been raised in the 23 Member States that are discussing or have introduced such rules. To date,

78. Sanders (n 69).
79. A. Sanders and others, *Entwurf eines Gesetzes für die Gesellschaft mit beschränkter Haftung mit gebundenem Vermögen (GmbH-gebV)*, 2021 (available online at: <https://www.gesellschaft-mit-gebundenem-vermoegen.de/der-gesetzesentwurf/> accessed 1 February 2023) overview in A. Sanders and others, 'Gesetzesentwurf GmbH mit gebundenem Vermögen – Verantwortungseigentum 2.0' (2021) 112 GmbHR 285.
80. Engel and Haubner (n 73) 844.

there have been no known attempts to convert respective companies across borders. Nevertheless, the compatibility of corporate asset locks with European law needs to be clarified: if the ECJ were to hold that the permissibility of cross-border conversions of asset-locked companies into foreign companies that are not subject to such restrictions is required by European law, shareholders would be able to circumvent mandatory asset locks under their own national law by means of a cross-border conversion.

1. Scope of Application of the Fundamental Freedoms

a) Freedom of Movement of Capital or Freedom of Establishment

First of all, it has to be clarified which fundamental freedom is relevant. In addition to the freedom of establishment, the free movement of capital must also be taken into account, since the restrictions on conversion and liquidation options in the Member States affect not only the company but also its individual shareholders: their shares are limited in value by the corporate asset lock. However, according to the traditional definition of the ECJ, the freedom of establishment should take precedence over the free movement of capital.[81] In a company with a corporate asset lock, the shares of the company are characterized exclusively by administrative rights while they lack pecuniary rights. Therefore, entrepreneurial commitment rather than any investment purpose appears to be the primary motivation for shareholders to acquire shares. As a consequence, the freedom of establishment uder Art. 49 (1) TFEU applies instead of Art. 63 (1) TFEU.[82]

b) Companies pursuant to Art. 54 (2) TFEU

However, the scope of application of the freedom of establishment raises questions. Although Article 54 TFEU states that this fundamental freedom also applies to companies, it excludes companies 'which are non-profit-making' in para 2.[83] While companies with an asset lock cannot distribute profits, they are characterized by the fact that not only commercial activities are pursued at the level of the company, but that the generation of profits at this level is both permissible and entirely desirable.[84] Even rules that require asset-locked companies to pursue certain social purposes do not exclude the pursuit of (also) profit-making objectives. On the contrary, hybrid companies are defined precisely by the combination of profit and purpose. In fact, 'profit and purpose' has become the leitmotif of this new type of company.[85] In view of the German proposal for the GmbH-gebV, which deliberately renounces any legal specification of its purpose, there is a fortiori no doubt about the pursuit of profit-making purposes at company level.

81. For an overview on the delimitation of the freedom of establishment and the free movement of capital, see W. Schön, 'Free Movement of Capital and Freedom of Establishment' (2016) 17 EBOR 229.
82. In this direction Case C-685/16 EV [2018] ECLI:EU:C:2018:743, para 34; Case C-464/14 SECIL [2016] ECLI:EU:C:2016:896, para 33.
83. More closely S. Korte in C. Calliess and M. Ruffert (eds), *TFEU Art. 54* (2020) para. 10 et seq.; cf also Stefan Grundmann, *European Company Law* (Intersentia 2007) 122 para 214; J. Tiedje in H. von der Groeben, J. Schwarze and A. Hatje (eds), *TFEU Art. 54* (7th edn, 2015) para 22; more about the exclusion of non-profit organizations, see S. Lombardo, 'Some Reflections on Freedom of Establishment of Non-Profit Entities in the EU' (2013) 14 EBOR 225.
84. See already above, I.2.a).
85. That's the title of K. Westaway's influential book, *Profit & Purpose: How Social Innovation Is Transforming Business for Good* (Wiley 2014).

The exclusion of the distribution of profits does not, however, lead outside the scope of the freedom of establishment. In contrast to the definition of 'nonprofit enterprise' proposed by Henry Hansmann with reference to the non-distribution of profits,[86] the wording of Art. 54 (2) TFEU clearly refers to the company and not to its shareholders.[87] Irrespective of the possibility of distributing profits, the prevailing view focuses on whether the company (also) pursues profit-making purposes.[88] Even football clubs, which participate in economic life, are protected by the fundamental freedom, regardless of whether or not profit-making is part of their actual corporate purpose.[89] Accordingly, it is considered to be largely agreed (*annähernd geklärt*) that foundations with legal capacity can also be regarded as companies within the meaning of Article 54 (2) TFEU, provided that they offer services against payment.[90] According to this understanding, the scope of application of the freedom of establishment includes companies with a complete asset lock, as long as the pursuit of commercial purposes is not completely excluded.

c) System of Property Ownership pursuant to Art. 345 TFEU

On an impartial reading, one could consider the scope of application of the fundamental freedoms to be completely excluded because, according to Art. 345 TFEU, the European treaties in no way affect the rules in Member States governing the system of property ownership. In fact, the proposal on the GmbH-gebV, as well as comparable rules in other jurisdictions, not only regulate issues of company law, but at the same time also define ownership positions by attributing administrative rights to the respective company shares and, conversely, denying pecuniary rights. Accordingly, critics even fear an attack on private property and complain, for example, that the idea of responsible ownership hijacks the concept of property and turns it into the opposite.[91] Article 14 of the German constitution (*Grundgesetz*) is also partly brought into line.[92] Obviously, the share-based regulations of the proposal can indeed be understood as an element of the property system.

However, the ECJ has interpreted Art. 345 TFEU rather narrowly, namely in the so-called Golden Share rulings.[93] While the Advocate General argued that the European Treaties are neutral with regard to the economic ownership of companies, and that Art. 345

86. Hansmann (n 11), 835, 838.
87. This perspective also corresponds to the English language version, which is, however, considered to be misleading due to the reference to 'non-profits': D. Jakob and M. Uhl, in B. Gsell and others (eds), German Civil Code § 80 (2022) para 857.
88. cf Lombardo (n 83) 225-63 (proposing a uniform, European notion of non-profit entities).
89. Tiedje (n 83) art. 54 para. 22.
90. K. Werner Lange and S. Sabel, 'Nachfolgeplanung unter Einsatz ausländischer Stiftungen' (2014) 6 ZStV 201, 204; B. Weitemeyer, in German Civil Code, § 80 (9th edn, 2021) para. 314-319.
91. In this sense, for instance, Fabian Wendenburg, Managing Director of the Association of Family Businesses in Agriculture and Forestry and Chairman of the German Property Foundation; see T. Sigmund, T. Hoppe and L. Holzki, 'Widerstand gegen die "GmbH für Verantwortungseigentum" formiert sich' (*Handelsblatt*, 4 Oct. 2020) <https://www.handelsblatt.com/politik/deutschland/reformplaene-widerstand-gegen-die-gmbh-fuer-verantwortungseigentum-formiert-sich/26241812.html?ticket=ST-9172453-ZybVcJE9upHohsYd0bQA-ap6>.
92. See, for example, Burgard (n 73) 1 (without justification); cf the well-founded discussion in *Lomfeld and Neitzel* (n 73).
93. More on the Golden Shares rulings: T. Szabados, 'Recent Golden Share Cases in the Jurisprudence of the Court of Justice of the European Union' (2019) 16 German Law Journal 1099-130; Grundmann (n 83), 502ff, para 847; cf also S. Grundmann and F. Möslein, 'The Golden Share – State Control in Privatised Companies: Comparative Law, European Law and Policy Aspects' (2001-2002) Euredia 623-676; ids., 'Die Goldene Aktie' (2003) ZGR 317, 338ff.

TFEU therefore gave the Member States the power to restrict the opportunities for private equity to invest in privatized companies,[94] the Court of Justice held that the ownership system existing in the Member States was not exempt from the fundamental principles of the Treaties, and emphasized that the obligation to comply with European Union law also applied in this respect.[95] Thus, the undeniable link with the system of property ownership does not exempt the relevant rules from being subject to the fundamental freedoms.

2. Obstacle to the Freedom of Establishment?

The general exclusion of companies with an asset lock from the possibility of conversion could therefore constitute a violation of the freedom of establishment under Articles 49 and 54 TFEU. In accordance with the general scheme of the fundamental freedoms, it must first be examined whether the respective Member State's rules constitute an obstacle to the freedom of establishment before it can be considered whether there are any possible grounds for justification.

a) Ensuring Cross-border Transfer of Seat and Corporate Conversions

The freedom of establishment under Art. 54 (1) in conjunction with Art. 49 (1) TFEU has been applied by the European Court of Justice to cross-border transfers of registered offices as well as to (other) conversions of companies. In the *SEVIC* case, the ECJ considered cross-border mergers to be covered by the freedom of establishment[96] and later extended this protection also to cross-border conversions. In the *Cartesio* decision, the Court ruled that the State of incorporation may prevent the transfer of the registered office, but not the conversion into a company of the State of incorporation.[97] Accordingly, Member States have the power to prevent companies under their own national law from retaining that status if, by transferring their registered office across borders, they break the link provided for by the national law of their Member State of incorporation.[98] However, the ECJ takes a very different view of the situation where a company from one Member State transfers its registered office to another Member State, thereby changing the applicable national law and converting itself into a form of company governed by the national law of the second Member State: in that case, the power of the Member State 'cannot (…) justify the Member State of incorporation, by requiring the winding-up or liquidation of the company, in preventing that company from converting itself into a company governed by the law of the other Member

94. Attorney General Ruíz-Jarabo Colomer, Opinion on Case C-367/98 *Commission v. Portugal* [2002] ECJ I-04731; Case C-483/99 *Commission v. France* [2002] ECR I-04781; Case C-503/99 *Commission v. Belgium* [2002] ECR I-04809, para 40 et seq.; id., Opinion on Case C-463/00 *Commission v. Spain* [2003] ECR I-04581; Case C-98/01 *Commission v. United Kingdom* [2003] ECR I-4641, paras 37, 54 et seq.
95. Case C-367/98 *Commission v. Portugal* [2002] ECJ I-04731, para 47 et seq.; Case C-483/99 *Commission v. France* [2002] ECR I-04781, para 43 et seq.; Case C-503/99 *Commission v. Belgium* [2002] ECR I-04809, para 43 et seq. See also Case C-463/00 *Commission v. Spain* [2003] ECR I-04581, para 67; Case C-98/01, *Commission v. United Kingdom* [2003] ECR I-4641, para 47 et seq.; Case C-171/08 *Commission v. Portugal* [2010] ECR I-06817, para 64; see also Case C-112/05 *Commission v. Germany* [2007] ECR I-08995 on the German Volkswagen Act.
96. Case C-411/03 *SEVIC Systems* [2005] I-10805; cf also Grundmann (n 83) 512, para 861.
97. Case C-210/06 *Cartesio* [2008] ECR I-09641; cf P. Craig and G. de Búrca, *EU Law: Text, Cases and Materials* (OUP 2020) 851ff.
98. Case C-210/06 *Cartesio* [2008] ECR I-09641, para 110.

State, to the extent that it is permitted under that law to do so'.[99] Moreover, this power in no way implies that 'national legislation on the incorporation and winding-up of companies enjoys any immunity from the rules of the EC Treaty on freedom of establishment'.[100]

Later, in the *Vale* decision, the Court of Justice ruled that, in the case of a cross-border conversion, companies may also invoke the freedom of establishment vis-a-vis the country of residence.[101] A regulation that allows conversions only for domestic companies is contrary to European law if it lacks a corresponding justification.[102] Finally, in the *Polbud* decision, the ECJ ruled that a cross-border change of legal form is also covered by the freedom of establishment if the company merely transfers its registered office but retains its effective registered office in the original Member State.[103]

b) Protection against Discrimination vs. Prohibition of Restrictions

However, it does not necessarily follow from this case law that the exclusion of the possibility for companies with an asset lock to convert into other legal forms is to be qualified as an obstacle to the freedom of establishment. There is a fundamental difference to the facts decided by the ECJ in the above-mentioned cases if provisions such as Sections 77n-p of the German Draft Act also exclude the conversion of such companies into other legal forms without an asset lock in a domestic context. The ECJ has not yet had to decide on the case of companies whose conversion is already excluded under national law in purely domestic situations. Instead, all of the above cases concerned companies that could have converted domestically under their respective national conversion laws, but chose to do so on a cross-border basis. The crucial question in each case was whether the national law of the Member State of departure (*Cartesio*) or in the Member State of destination (*Vale*) could constitute an obstacle to such a cross-border conversion, which was answered in the negative by the ECJ.

While the case law has consistently dealt with cases of discrimination against cross-border situations as opposed to domestic conversions, it is still considered doubtful whether on the basis of the ECJ case law, cross-border conversions are generally protected by the prohibition of restrictions on the freedom of establishment, or whether they only enjoy protection against discrimination.[104] In any event, the *SEVIC* and *Vale* rulings can be interpreted as meaning that the freedom of establishment at least prohibits the host state only from unjustifiably discriminating against cross-border conversions.[105] The sweeping assertion that the freedom of establishment has evolved in the case law of the ECJ from a mere prohibition of discrimination to a prohibition of restrictions[106] is in any case inadequate.

At best, one could ascribe an asymmetrical protection to the freedom of establishment, which extends further in the home (outbound) Member State than in the host (inbound)

99. Case C-210/06 *Cartesio* [2008] ECR I-09641, para 112.
100. See again Case C-210/06 *Cartesio* [2008] ECR I-09641, para 112.
101. Case C-378/10 *VALE Építési kft* [2012] EU:C:2012:440, para 33.
102. ibid para 41.
103. Case C-106/16 *Polbud – Wykonawstwo sp. z o.o.* [2017] EU:C:2017:804, EU:C:2017:804; Craig and de Búrca (n 97) 852ff; cf I. Basova, 'Cross-Border Conversions in the European Union After the Polbud Case' (2018) 1 Nordic Journal of European Law 63.
104. A. Ego, in *German Stock Corporation Act Vol. 7, European stock corporation law, B. European Freedom of establishment* (5th edn, 2021) para. 105. See also Grundmann (n 83) 125ff, para 121.
105. Case C-411/03 *SEVIC Systems* [2005] I-10805, paras 14 et seq., 18, 20, 22 et seq., 31; Case C-378/10 *VALE Építési kft* [2012] EU:C:2012:440, para 30 et seq.; Ego (n 104), para 105.
106. Engel and Haubner (n 73) 844, 845ff.

Member State. Indeed, the *Cartesio* and *Polbud* judgments are sometimes interpreted as meaning that the founding or home Member State may not unjustifiably hinder its companies in the event of a change of legal form and is subject to a prohibition of restrictions that does not only prohibit discrimination against cross-border conversions.[107] According to this interpretation, the exclusion of the possibility of conversion for companies subject to an asset lock to convert in outbound cases would be problematic.

However, the case law provides only weak support for such an asymmetrical understanding of the freedom of establishment, since a change of legal form was not sought in *Cartesio* and was in principle possible in *Polbud*. Therefore, in both decisions, the ECJ had no reason to formulate the reservation that the outbound Member State must be aware of the domestic change of legal form. At most, the wording of Art. 54 TFEU provides some indication that cross-border changes of legal form are guaranteed to a greater extent vis-a-vis the outbound Member State than vis-a-vis the inbound Member State. Since the norm only protects companies 'formed in accordance with the law of a Member State', the formation of a company in the inbound (host) Member State can also be understood as a preliminary question of the freedom of establishment in the case of cross-border conversions, whereas the (originally) effective formation in the outbound Member State is in any case beyond doubt.

However, as this interpretation has not yet been confirmed by the ECJ, an asymmetry in the protection afforded by the freedom of establishment may be justifiably regarded as inconsistent.[108] For this reason, it is generally regarded as unproblematic under European law that, for example, neither the German Civil Code (*Bürgerliches Gesetzbuch – BGB*) nor the German Transformation Act (*Umwandlungsgesetz – UmwG*) permit transformations of or into foundations that retain their identity. In this respect, the absence of discrimination is emphasized by many authors.[109]

c) Freedom to Choose the Legal Form

aa) Limitation to Congruent Foreign Forms

Even if one interprets the freedom of establishment vis-a-vis the state of incorporation as a prohibition of restrictions, this state is by no means obliged under European law to enable a change of legal form into any foreign legal form. The fundamental freedom in no way guarantees a comprehensive freedom of choice of legal form within the EU.[110]

For example, an obligation on Member States to enable the conversion of domestic foundations with legal capacity (which are protected by the freedom of establishment)[111] into foreign limited liability companies would clearly overstretch the protective purpose of the freedom of establishment. A cross-border move simply does not require the possibility of such a change of legal form, which would change the fundamental nature of the company. If Member States were nevertheless forced to open up this possibility, the characteristic requirements of the Member States' company or foundation laws would ultimately be

107. Ego (n 104), para 105.
108. ibid.
109. Weitemeyer (n 90), at § 80 para 319; Engel and Haubner (n 73) 844, 849. In the case of foundations with legal capacity, only the spin-off of an enterprise operated by the foundation is possible (cf section 161 German Conversion Act, *UmwG*), on this, eg R. Hüttemann and P. Rawert in W. Bayer and J. Vetter (eds) *Lutter Kommentar zum Umwandlungsgesetz § 161* (2023) para 1 et seq. Otherwise, the foundation is not covered by the German Conversion Act (cf sections 1, 3, 124 para 1, 175, 191 *UmwG*).
110. Engel and Haubner (n 73) 844, 845.
111. (n 90).

undermined. If, for example, a legal entity previously constituted as a foundation were to be converted into a limited liability company, it would no longer be a legal entity without members and endowed with assets for the permanent and sustainable fulfillment of a purpose specified by the founder[112] and would completely lose these essential characteristics of its previous legal form. Legal scholars, therefore, do not even question the fact that, under European law, foundations do not constitute a legal entity eligible for a (cross-border) change of legal form under the German Transformation Act (*UmwG*),[113] although foundations may well fall within the scope of the freedom of establishment.[114]

For other legal forms, however, it must also be possible to ensure that their typical legal features, ie the mandatory asset lock, are preserved in the event of a cross-border conversion. In principle, it is up to the national legislator to decide on the contours of its own legal forms.[115] Member States enjoy regulatory autonomy in the design of these features.[116]

bb) Absence of Congruent Legal Forms?

The freedom of choice of legal form granted by the freedom of establishment is thus limited to largely similar foreign legal forms. The cases decided by the ECJ all concerned conversions into a congruent legal form, such as the merger of a German AG with a Luxembourg SA (*SEVIC*).[117] A cross-border move does not require a conversion into an incongruent legal form. Incongruent conversions are therefore not covered by the freedom of establishment.[118] Accordingly, Member States are under no obligation under European law to enable changes of legal form into foreign legal forms that are not congruent in nature, unless they already enable such a change of legal form domestically (and thus the prohibition of discrimination applies).[119] As a result, the German legislator can easily restrict the cross-border conversion of a GmbH-gebV to such foreign legal forms which provide for a comparably strict asset lock and which also correspond to the other essential features of this legal form. The principle of effectiveness does not prevent such a restriction because the cross-border conversion fails due to the lack of essentially related foreign legal forms, but not due to the restriction by the German legislator.[120]

112. Thus section 80 para 1 sentence 1 German Civil Code. On the characteristics of the foundation: E. Müller, 'Der Wesensgehalt der Rechtsform Stiftung' (2021) 5 ZStV 167, 169ff.
113. In this sense, Engel and Haubner (n 73) 844, 849.
114. (n 90).
115. W. Schön, 'Der Anspruch auf Haftungsbeschränkung im Europäischen Gesellschaftsrecht' in *Festschrift für Peter Hommelhoff zum 70. Geburtstag* (Bernd Erle 2012) 1037, 1048ff; Engel and Haubner (n 73) 844, 847.
116. In detail D.A. Verse, 'Niederlassungsfreiheit und grenzüberschreitende Sitzverlegung – Zwischenbilanz nach "National Grid Indus" und "Vale"' (2013) 3 ZEuP 458, 487ff.
117. Case C-411/03 *SEVIC Systems* [2005] I-10805, para 2; Case C-378/10 *VALE Építési kft* [2012] EU:C:2012:440, para. 9 et seq (change of legal form of an Italian (S.r.l.) into a Hungarian (kft.) Company with limited liability); furthermore: OGH, 6 Ob 224/13d [2014] (change of legal form of an Italian S.a.s. into an Austrian KG); OLG Nürnberg, 12 W 520/13 [2013] (change of legal form of a Luxembourg (S.à.r.l.) into a German company with limited liability).
118. Engel and Haubner (n 73), 844, 849.
119. In more detail S. Kalss and C. Klampfl, in M.A. Dauses and M. Ludwigs (eds) *Handbuch des EU-Wirtschaftsrechts, E. III.* (2022) para 128. See also W. Bayer and J. Schmidt, 'Das Vale-Urteil des EuGH: Die endgültige Bestätigung der Niederlassungsfreiheit als "Formwechselfreiheit"' (2012) 31 ZIP 1481, 1488ff; P. Kindler, 'Der reale Niederlassungsbegriff nach dem VALE-Urteil des EuGH' (2012) 23 EuZW 888, 890; W.-H. Roth, 'Internationalprivatrechtliche Aspekte der Personengesellschaften' (2014) 43 ZGR 168, 207ff.
120. According to this provision, the exercise of the rights conferred by the Union legal order may not be rendered practically impossible or excessively difficult; restrictions on this freedom are only permissible for overriding reasons in the general interest, cf Case C-378/10 *VALE Építési kft* [2012] EU:C:2012:440, para 48, 58.

As long as there was no legal form with a full, mandatory asset lock in other Member States, a prohibition on (cross-border) conversion would not go any further than such a restriction. However, if only one other Member State provides for a congruent legal form, such a prohibition would constitute an obstacle to the freedom of establishment.[121] Whereas the comparative survey has shown that many European jurisdictions provide for restrictions on profit distributions but do not offer legal forms with a strict asset lock, the Swedish *aktiebolag med vinstutdelningsbegränsning* (limited liability company with restricted distribution of profits) has great similarities. It is therefore not unlikely that it will be qualified as a congruent legal form by the ECJ. However, this Swedish legal form is relatively rare, thereby at least reducing the likeliness of a restriction to occur. Other Member States, in turn, are not obliged under European law to introduce a comparable legal form, since the freedom of establishment in the host state only includes a prohibition of discrimination pursuant to Art. 54 (2) TFEU.[122]

In order to ensure that the German provision complies with the fundamental freedoms, the German legislator could (or even should) provide for a restriction to transformations into more precisely defined, congruent foreign legal forms instead of the blanket prohibition of the current draft (cf Sec. 77n (3) to (5)).

cc) Irrelevance of Formal Typification

With respect to the current German draft, there is an additional issue of legal construction that needs to be clarified. In this draft, the new company form (GmbH-gebV) is formally construed as a subtype of the limited liability company (GmbH), although its substantive features, namely the asset lock, are very different from this conventional company form. Against this background, it has been argued that the cross-border conversion of the legal form of a GmbH-gebV into a foreign legal form similar to a GmbH should be regarded as congruent with the legal form, because on the basis of the current formal typification, the GmbH-gebV is to be regarded as a mere variant of the GmbH and not as an independent legal form.[123] However, this argument is not convincing. Regardless of the currently proposed embedding in the law on limited liability companies (GmbHG), it is already questionable whether the GmbH-gebV is a legal form variant at all.[124] In view of the fundamental structural differences between GmbH and GmbH-gebV, the latter could well be qualified as a separate legal form.[125]

Whether new corporate creations are designed as legal form variants or as (more or less) separate legal forms is ultimately a formal question of legislative construction.[126] In France, for example, the *société par actions simplifiée (SAS)* is regarded as a legal form 'in between' the *SA* and the *SARL*, but it is formally established as a legal variant of the *société ano-*

121. This is overlooked by Engel and Haubner (n 73) 844, 846; accordingly, the effectuation of the asset lock is by no means only relevant 'at the level of a possible justification'.

122. See above, II.2.b.

123. Engel and Haubner (n 73) 844, 845ff (emphasizing, however, that there are de facto no legal forms corresponding to the GmbH-gebV, 847).

124. On the design as a legal form variant of the *GmbH*, see Draft 2021, 21.

125. Fleischer (n 73), 345, 355. On the legal form variant as an institution under company law: J. Lieder and M. Becker, 'Das Sonderrecht der Rechtsformvarianten am Beispiel der UG' (2021) 9 NZG 357, 357; J. Lieder, 'Rechtsformvariante und Rechtsscheinhaftung – Ein Beitrag zur Institutionenbildung im Gesellschaftsrecht' in W. Bayer and P. Selentin (eds) *Festschrift 25 Jahre Deutesches Notarinstitut* (2018) 503, 504-12.

126. H. Fleischer, 'Ein Rundflug über Rechtsformneuschöpfungen im in– und ausländischen Gesellschaftsrecht' (2022) 18 NZG 827, 830ff ('small' vs 'large solution').

nyme,[127] even though there is a specific chapter in the Code de commerce (L. 227-1 et seq.) which is dedicated to this corporate form. The transitions between separate legal forms and form variants are also fluid. In Germany, Sections 105 (3) and 161 (2) of the Commercial Code (*Handelsgesetzbuch – HGB*) illustrate that independent legal forms do not require a complete set of rules, but can largely build on other legal forms: both provisions refer extensively to rules that are originally applicable to other legal forms. Given such references, it is difficult to measure the extent to which separate legal forms differ from other legal forms. Finally, one can also refer to the new legal forms introduced by Germany, France and several other Member States, following the ECJ case law on the freedom of establishment in order to compete with the UK limited liability company. The French *entreprise unipersonelle à responsabilité limitée (EURL)* and the German *Unternehmergesellschaft (UG (haftungsbeschränkt))* are formally subtypes of the respective limited liability company, but could just as well have been designed as separate legal forms. Indeed, the original proposal in Germany pointed in this direction.[128] Irrespective of their character as subtypes of limited liability companies, the specific features of these subtypes are likely to exclude cross-border conversions into the respective foreign basic legal form, in particular because of stricter capital requirements.[129] Finally, it follows from the legal concept of Art. 54 (2) TFEU that the contours of legal forms are left to the discretion of Member States with regard to these questions of formal typification and the structural design of legal rules.[130]

The assessment of whether domestic and foreign legal forms are doctrinally similar is to be decided by the ECJ regarding the scope of the freedom of establishment. This is also obvious because the answer to this question requires a legal comparison of the form-specific characteristics in different Member States. The legal technicalities at the level of Member State law do not play a role in this assessment under European law,[131] similar to the Golden Shares rulings on the free movement of capital.[132] To be on the safe side, however, it would make sense for the national legislator to create an independent legal form instead of a legal form variant.[133] In doing so, the legislator could work with references to other legal forms, eg to the law on limited liability companies or even cooperatives and foundations. In this way, practical experiences and case law can be taken into account, while at the same time

127. OECD, *Flexibility and Proportionality in Corporate Governance* (2018), 24.

128. During the legislative process, different versions have been discussed: Fleischer (n 126), 827, 830ff; U. Seibert, 'Ist es an der Zeit, den Rechtsformzusatz der Unternehmergesellschaft (haftungsbeschränkt) abzukürzen (§ 5a Abs. 1 GmbHG)?' in M. Hoffmann-Becking and P. Hommelhoff (eds) Festschrift für Gerd Krieger zum 70. Geburtstag (2020) 912; J. Gehb, G. Drange and M. Heckelmann, 'Gesellschaftsrechtlicher Typenzwang als Zwang zu neuem Gesellschaftstyp – Gemeinschaftsrecht fordert deutsche UGG' (2006) 3 NZG 88.

129. cf only J. Schmidt in L. Michalski and others (eds) *German Limited Liability Company Act (GmbHG)*, § 5a (2017) para 45 with further references.

130. (n 115).

131. In this sense (on golden shares): Grundmann and Möslein (n 93) 317, 322.

132. with further references: S. Grundmann and F. Möslein, 'Die Goldene Aktie und der Markt für Unternehmenskontrolle im Rechtsvergleich – insbesondere Staatskontrollrechte, Höchst– und Mehrfachstimmrechte sowie Übernahmeabwehrmaßnahmen' (2003) 102 Zeitschrift für Vergleichende Rechtswissenschaft 289, 301ff; F. Möslein, 'Kapitalverkehrsfreiheit und Gesellschaftsrecht' (2007) ZIP 208-09.

133. For its own legal form M. Reiff, 'Entwurf eines Gesetzes für die GmbH in Verantwortungseigentum (VE-GmbH) vorgelegt' (2020) 36 ZIP 1750, 1753; id., 'Verantwortungseigentum "mit gebundenem Vermögen"' (2021) 21 Neue Juristische Online-Zeitschrift 609, 611; in the draft itself, cf Draft 2021, 21ff, 53ff, 88ff. Rejecting a legal form variant of the GmbH: R. Kirchdörfer and R. Kögel, 'Die "GmbH im Verantwortungseigentum" VE-GmbH bzw. die "GmbH mit gebundenem Vermögen (GmbH-gebV)" – eine kritische Bewertung' in F. Bien and others (eds) *Maß– und Gradfragen im Wirtschaftsrecht: Festschrift für Wernhard Möschel zum 80. Geburtstag* (2021) 181, 208.

leaving the way open for tailor-made regulations that meet the specific needs of the companies.[134] However, (full) implementation in foundation law would not bring any advantages from a European perspective; moreover, it would not do justice to the entrepreneurial character of the social enterprise concept.[135] Irrespective of any legal technicalities, it is more than likely that the ECJ will qualify the asset lock as a specific and distinctive feature of the respective legal form.[136]

3. Level of Justification

Even if one wants to assume that there is a restriction of the freedom of establishment despite all these counter-arguments, there is still a possibility of justification. According to the established case law of the *ECJ*, there is no infringement of fundamental freedoms if restrictions are justified by written reasons for justification or by overriding reasons of the general interest. National rules must also be appropriate and necessary.[137] A number of justifications have already been recognized by the ECJ: in particular, the protection of creditors, minority shareholders and employees in the context of company law;[138] also recognized are fiscal interests,[139] environmental considerations,[140] the protection of fair trading[141] and the maintenance of the solvency of market participants.[142] However, this enumerative list remains open for future development, so that other interests may be protected by Member States.[143]

a) Overriding Reasons of General Interest

aa) Legislative Requirements of Corporate Purposes

Some authors claim that such a justification would always require a legislative requirement of charitable purposes.[144] While most (if not all) asset locks that have been introduced by

134. For this purpose: Draft 2021, 87ff.
135. This is indicated by Engel and Haubner (n 73)844, 849; Kirchdörfer and Kögel (n 133) 181, 208 advocating implementation in the form of a foundation; also Burgard (n 73) 1; as a result, also D. Markworth, 'Das Stiftungsrecht am Scheideweg' (2021) 3 NZG 100; a study published by the Family Business Foundation and drew up by Mathias Habersack and the International Performance Research Institute gGmbH (IPRI): *Foundation Companies in Germany* (2021) *passim*; A. Karst and R. Müller-Gschlößl, 'Die Gesellschaft mit beschränkter Haftung mit gebundenem Vermögen' (2021) 32 NJOZ 961, 964; L. Henn, *Zeitschrift für die notarielle Beratungs– und Beurkundungspraxis* (Otto Schmidt 2021) 241, 246; on the (de lege lata) unsuitability of the foundation, von Homeyer and Reiff (n 73) 224, 228ff; J. Veith, 'Die "Gesellschaft in Verantwortungseigentum" – Idee und Umsetzbarkeit nach aktueller Rechtslage' (2019) 1 Non Profit Law Yearbook 15, 18ff.
136. In fact, even critics concede that there are in fact no legal forms abroad corresponding to the GmbH-gebV, cf Engel and Haubner (n 73) 844, 847.
137. Case C-106/16 *Polbud – Wykonawstwo sp. z o.o.* [2017] EU:C:2017:804, para 52.
138. Case C-106/16 *Polbud – Wykonawstwo sp. z o.o.*, [2017] EU:C:2017:804, para 54; Case C-411/03 *SEVIC Systems* [2005] I-10805, para 28; on employees, see Case C-201/15 *AGET Iraklis – Koinonikis Asfalisis kai Koinonikis Allilengyis* ECLI:EU:C:2016:972, para 73 with further references.
139. C-208/00, *Überseering* [2002] 2002 I-09919, para 92; Grundmann (n 83) 500ff, paras 844-45.
140. Case C-492/14 *Essent Belgium* [2016] ECLI:EU:C:2016:732, para 101; Case C-573/12 *Ålands Vindkraft* [2014] ECLI:EU:C:2014:2037, para 77.
141. Case C-378/10 *VALE Építési kft* [2012] EU:C:2012:440, para 39; Case C-411/03 *SEVIC Systems* [2005] I-10805, para 28; Case C-167/01 *Inspire Art* [2003] I-10155, para 132.
142. Case C-101/94 *Commission v. Italy* [1996] I-02691, para 23.
143. Korte (n 83) art. 49 para 74; from case law, for example, Case C-563/17 *Associação Peço a Palavra* [2019] ECLI:EU:C:2019:144, para 71 et seq. on air connections as a service of general interest.
144. Engel and Haubner (n 73) 844, 848.

European Member States are linked to such requirement,[145] the German legislative proposal does not require a commitment to a charitable purpose.[146] The basic idea is rather that the selection of 'good' corporate purposes should not be prescribed by the state but left to the companies. Provided that profit maximization does not determine corporate action, it seems very likely that companies pursue socially responsible or sustainable purposes. Such openness of purpose does not, however, stand in the way of justification: at the level of justification, it is not the concrete possibilities of individual companies to define purposes that are important, but the considerations of the legislator in enacting the relevant company law rules. Accordingly, in the Golden Shares rulings on the free movement of capital, the ECJ did not focus on the actual exercise of the special rights in question at the justification level, but on their legal basis.[147]

Therefore, it is not corporate purposes that are to be justified, but the state measures that have been qualified as restrictions to the fundamental freedoms, in this case the statutory exclusion of the possibility of conversion. The lack of a purpose does not prevent this state measure from being justified, on the contrary. The purpose of the fundamental freedoms is to bind state action, not private action, by removing specific market entry barriers of the member states.[148] Demanding a limitation of corporate purposes at the level of justification would effectively counteract this function of the fundamental freedoms. From the European law standpoint, the legislator may therefore allow a free choice of corporate purposes beyond shareholder value, instead of making the obligation to pursue public welfare-oriented or charitable purposes a prerequisite for the choice of legal form.[149]

bb) Legislative Motives for Asset Locks

The justification therefore depends on the motives that led the lawmaker to enact the rules in question. In this respect, the legislative materials and in particular the justification of the law play a central role (but are, as a matter of fact, not yet available for the German draft).[150] For the time being, one can make do with the considerations of the initiators and the justification of the academic draft proposal, but one can also rely on the statements in the German coalition agreement. In the coalition agreement, companies with an asset lock are mentioned in connection with the national strategy for social enterprises, which is intended to provide greater support for companies oriented towards the common good and social innovations.[151] Improving the legal framework for social enterprises is also mentioned as a general objective.[152]

Accordingly, proponents argue that asset locks should enable a new form of entrepreneurship with long-term preservation of independence and commitment to a corporate

145. See above, at I.1.a.bb.

146. Draft 2021, 24ff.

147. See, for example, Case C-543/08 *Commission v. Portugal* [2010] I-11245, paras 90-92; with a different tendency, however, Advocate General Colomer, Opinion on Case C-367/98, *Commission v. Portugal* [2002] I-4733, paras 67, 70 and 90 et seq.; cf also Grundmann and Möslein (n 93) 317, 340.

148. In the context of freedom of establishment, C. Tietje, '§ 10 Freedom of Establishment' in *European Fundamental Rights and Freedoms* (Dirk Ehlers 2007) 281, 281ff.

149. In general, on the relevance of purpose in the nonprofit sector: F. Möslein in *The Law of Third Sector Organizations in Europe: Foundations, Trends and Prospects* (Fici 2022) 1.2.

150. See, for example, Advocate General Kokott, Opinion on Case C-48/13 *Nordea Bank Danmark – Skatteministerie* [2014], ECLI:EU:C:2014:2087, para 59.

151. Coalition Agreement 2021-2025 (n 72) 30.

152. ibid J. Göttel, 'Was die Ampel für gemeinnützige Organisationen, Sozialunternehmen und das Ehrenamt plant' (2022) 1 npoR 17, 18; D. Rubner and D. Leuering, 'Das Gesellschaftsrecht im Koalitionsvertrag' (2022) 1 Neue Juristische Wochenschrift Spezial 15.

purpose.[153] A commitment to a purpose that goes beyond profit-making is seen by economists as an important step towards developing the sustainable economy of the future.[154] Business decisions should be able to be made with a view to the corporate purpose, to the well-being of the environment, customers and employees, rather than with a view to shareholder value. Conversely, shareholder value orientation is seen as a major obstacle to the development of sustainable entrepreneurship.[155] However, purpose orientation can only have a positive impact if this commitment goes beyond mere lip service and greenwashing.[156] The concept to be implemented by the German draft on the GmbH-gebV takes a radical approach in that the exclusion of dividend rights precludes any focus on shareholder value.[157] In this way, the asset lock is thus intended to create a framework within which socially, economically and environmentally sustainable entrepreneurship can develop, thus indirectly serving sustainability goals.

The companies organised in the *Stiftung Verantwortungseigentum e.V.* illustrate the entrepreneurial commitment within the framework of this freedom of choice.[158] The search engine Ecosia, for example, wants to ensure that the increase in value of the search engine generated by customer use cannot be appropriated by the shareholders, but instead benefits the purpose of the company, ie the planting of trees. The aim of the legal form is to preserve independent companies that are not sold to large competitors after just a few years. The aim is to maintain a diverse business landscape and to counteract corporate concentration. The corporate structure is thus intended to create a framework for the credible pursuit of purpose and stakeholder orientation.[159] Customers and employees should be able to trust that the decision against shareholder value orientation will not be reversed. The strong reactions to Nestlé recent acquisition of the spice retailer Ankerkraut give an idea of the importance of such trust.[160] For Generation Z in particular, questions of meaning and credible statements of commitment from employers can play an important role in their career choices.[161] When employees make company-specific investments in the belief that such promises will be kept, their trust deserves legal protection. Particularly in the age of the platform economy, customers are also concerned about whom they enter into contractual relationships with and entrust with their data. In the case of for-profit companies, they have to fear that network effects will be used to extract monopoly profits. Since only asset locks can credibly guarantee the renunciation of such profits, companies such as Ecosia, Signal, Mozilla Firefox and Startnext do operate on the basis of structures that guarantee the lock-in of corporate assets.[162] The proposed rules aim to legally protect the legitimate trust of employees and customers by permanently securing the promise of no profit distributions.

153. A. Bruce and C. Jeromin, *Corporate Purpose – das Erfolgsrezept der Zukunft* (Aufl 2020) 161ff; on purpose: H. Fleischer, 'A Management Concept and its Implications for Company Law' (2021) 18 ECFR 161; Edmans (n 2).
154. C. Mayer, *Prosperity* (OUP 2018); Edmans (n 2).
155. B. Sjåfjell and others, 'Shareholder primacy: the main barrier to sustainable companies' in B. Sjåfjell and B.J. Richardson (eds) *Company Law and Sustainability: Legal Barriers and Opportunities* (CUP 2015) 79.
156. R. Gulati, *Deep Purpose* (Harper Business 2022) 4ff, 'convenient purpose'.
157. Noah Neitzel, 'Vermögensbindung und Nachhaltigkeit' (2022) 55 KJ 479.
158. Foundation for Steward-Ownership <https://stiftung-verantwortungseigentum.de/> (last visited Sept. 1, 2023).
159. Bruce and Jeromin (n 153) 161ff.
160. See only S. Diemand, 'Großkonzerne essen Seele auf' (*Frankfurter Allgemeine Zeitung*, 16 May 2022).
161. See, for example, C. Scholz, *Generation Z 190-198* (2014). See also the contributions in A. Esmailzadeh and others, *GenZ: Für Entscheider:innen* (Campus Verlag 2022).
162. S. Verantwortungseigentum, *Eine Eigentumsform für langfristig werteorientiertes Unternehmertum*, 40 <https://verantwortungseigentum.com/verantwortungseigentum.html>.

cc) Sustainability as a Justification

In the context of fundamental freedoms, it is important whether these considerations are recognized in European law. From the outset, the EU Treaty links the creation of the internal market with the requirement of a 'sustainable development of Europe based on balanced economic growth' (Article 3 no. 3 TEU).[163] Thus, the European treaties themselves enshrine the goal of sustainability.[164] In addition, the horizontal clauses of the TFEU have an indicative effect. In particular, the general clause in Art. 11 TFEU on environmental protection is interpreted broadly to include economic and social concerns.[165] In addition, there are references to consumer, animal and health protection (Art. 12, 13 and 168 (1) TFEU). Regulations dealing with EU policies, such as industrial policy (Art. 173 (3) para. 1 sentence 1 TFEU), refer to EU initiatives, but at the same time extend to the recognition of parallel efforts of the Member States.[166]

Accordingly, the EU's many initiatives on sustainability goals, such as the European Union 2001 and 2006 Sustainable Development Strategies, are significant.[167] In addition, there are the sustainability disclosure requirements in the financial services sector[168] and, most recently, the proposal for a directive on corporate sustainability due diligence.[169] The EU also wants to encourage a move towards social and long-term oriented entrepreneurship.[170] The longevity of companies and the resulting 'sustainable economic growth' are key demands of the EU sustainability strategy.[171] At the same time, the European Commission links social entrepreneurship to sustainability goals. For example, its Social Entrepreneurship Initiative states that social enterprises 'create sustainable growth by taking into account their environmental impact and by their long-term vision'.[172] At the same time, the European Economic and Social Committee explicitly urges Member States to adopt 'creative ways of supporting expenditure aimed at sustainable economic growth'.[173] With its focus on non-profit entities, also the recent draft proposal for a European cross border association

163. To this, see N. De Sadeleer, *EU Environmental Law and the Internal Market* (OUP 2014); L.A. Avilés, 'Sustainable Development and the Legal Protection of the Environment in Europe' (2012) 7 Sustainable Development Law and Policy 28.
164. Engel and Haubner (n 73) 844, 848.
165. See, for example, M. Nettesheim in *Das Recht Der Europäischen Union* (Eberhard Grabitz, Meinhard Hilf & Martin Nettesheim), TFEU Art. 191 (2022) para 123.
166. J. Ukrow and G. Ress, in *Das Recht Der Europäischen Union* (Eberhard Grabitz, Meinhard Hilf & Martin Nettesheim), TFEU Art. 63 (2002) para 273.
167. Commission Communication of 15 May 2001, COM (2001) 264; Council of the European Union of 9 June 2006, 10 117/06 ENV 335 and Commission Communication of 24 July 2009, COM (2009) 400 final.
168. See Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on sustainability-related disclosures in the financial services sector, 2019 OJ L317/1 and Regulation (EU) 2019/2089 of the European Parliament and of the Council of 27 November 2019 amending Regulation (EU) 2016/1011 as regards EU Climate Transition Benchmarks, EU Paris-aligned Benchmarks and sustainability-related disclosures for benchmarks, 2019 OJ L317/17.
169. COM (2022) 71 final.
170. eg European Commission, 'Social Entrepreneurship Initiative' (2014) <https://ec.europa.eu/docsroom/documents/14583/attachments/3/translations/en/renditions/pdf>; in the area of CSR and sustainable finance, see also the comparative law study European Commission, 'Social enterprises and their ecosystems in Europe' (2020) <https://op.europa.eu/en/publication-detail/-/publication/4985a489-73ed-11ea-a07e-01aa75ed71a1/language-en/format-PDF/source-123378057>; as well as European Union, 'Action Plan Financing Sustainable Growth' COM(2018) 97 p. 4, 12. See also and with further references Möslein (n 13) 175-76ff.
171. For example: European Parliament Resolution of 10 March 2022 on the European Semester for economic policy coordination: Annual Sustainable Growth Survey 2022 (2022/2006(INI).
172. European Commission, 'Social Business Initiative' COM(2011) 682 final, at p. 3.
173. Opinion of the European Economic and Social Committee on Enhancing sustainable economic growth across the EU, 2020 OJ (C 364/29) 30.

of September 5th 2023 (2023/0315) plays a role at the justification level: In Art. 2 lit. c of this proposal, the European lawmaker recognizes the existence of entities that, regardless of whether their activities are of an economic nature or not, can use any profits that they generate only in pursuit of their objectives, thereby excluding any profit distribution. At the level of existing secondary law, also the ECJ has already emphasised on several occasions that the prohibition of profit distributions is an important element of the non-profit status.[174] The link between asset locks and social and sustainable entrepreneurship has thus already been recognised in case law.

dd) Stabilization as a Justification

Asset locks serve other overriding reasons of general interest as well: it can have a stabilising effect on the market economy. At the very least, empirical studies suggest that asset-backed companies tend to last longer.[175] At the same time, a reduction in speculative transactions can be expected, as speculative acquisition of shares becomes less attractive if asset locks apply. Both of these mechanisms can be used to justify a restriction on the freedom of establishment, to the extent that such a restriction exists at all. In the context of restrictions on the free movement of capital introduced by Cyprus, the European Commission has explicitly recognised the stability of the financial markets and the financial system as overriding reasons in the general interest.[176] A stabilisation of the financial markets by reducing speculative financial market transactions, as can be achieved, for example, by a financial transaction tax, can also be considered to be in the general interest.[177] What is recognized as a general interest in the context of the free movement of capital can also serve as a justification in the context of the freedom of establishment. Against this background, it seems very likely that the purposes served by the asset lock will be recognised as overriding reasons in the general interest and can justify a restriction of the freedom of establishment.

b) Appropriateness and Necessity

Finally, restrictions on the freedom of establishment must be appropriate and necessary to achieve the objective. At the level of this proportionality test, the achievability of sustainability goals is sometimes declared to be the general yardstick and the question is asked whether the introduction of the new legal form is suitable and necessary in view of these goals. However, since the restriction is not the corporate form as such (nor the asset lock), but rather the safeguarding of the asset lock through the prohibition of (cross-border) conversions, the appropriateness and necessity must be examined in this more specific respect.

aa) Achievement of Sustainability Goals

Since asset locks are not a mandatory requirement for sustainable business, but responsible entrepreneurship is in fact practiced in many different forms,[178] doubts are sometimes expressed about its necessity.[179] In fact, there are legal forms or qualifications such as the

174. Most recently ECJ, Judg. v. 7.7.2022, Cases C-213 and 214/21, ECJ Judt. v. 7.7.2022 – C-214/21, para 34; similarly ECJ, Judg. v. 21.3.2019, Case C-465/17, BeckRS 2019, 3869, para 59 (Falck Rettungsdienste and Falck).
175. Sanders and Thomsen (n 68) 127ff.
176. For more details, see Ukrow and Ress (n 165) art. 63 para 308.
177. See, for example, F. Mayer and C. Heidfeld, Europarechtliche Aspekte einer Finanztransaktionssteuer (2011) 10 EuZW 373, 378.
178. Draft 2021, 11.
179. Engel and Haubner (n 73) 844, 848.

benefit corporation and the *société à mission* that serve sustainability goals without providing for a strict mandatory asset lock.[180]

Conversely, these legal forms are based on a purpose specified by the legislator which aims to promote the common good.[181] As a result of this specification, these forms do not necessarily provide more scope for entrepreneurial activity than a legal form which instead provides for an asset lock. For example, the provision of a search engine cannot be qualified as a charitable purpose per se, nor can the operation of a deposit system for coffee cups. Purpose-linked legal forms are therefore not necessarily available for respective companies, even though their business models may well serve sustainability in a more general sense. In addition, purpose requirements limit entrepreneurial scope with a certain degree of arbitrariness, as there are no uniform, universally recognized catalogues of charitable purposes at either the European or the Member State level. Moreover, such catalogues are not likely to be open to future development, while the concept and needs of public welfare necessarily change over time. As a result of the current *Zeitenwende*, this dynamic of change is particularly evident in connection with the war in Ukraine, as it suddenly seems conceivable that not only energy production with coal and nuclear power, but even the production of weapons can somehow contribute to the common good.[182] Whether purpose specifications or asset locks are the less restrictive measure is by no means obvious. Even rules that provide for only partial asset locks are not necessarily less intrusive than complete asset locks, because and to the extent that (as in the foreign legal forms mentioned)[183] these rules are often additionally linked to specified purposes, which in turn also restricts the scope for entrepreneurial activity.

More generally, the necessity is also questioned because, unlike the EU Taxonomy Regulation for instance, the German draft does not formulate specific sustainability criteria.[184] However, more specific sustainability requirements restrict the addressees of the regulation to an even larger extent than more general regulations. Such specifications are therefore certainly not a less restrictive measure. It would be downright absurd if regulatory instruments that leave companies more scope for entrepreneurial activity were more difficult to justify in the context of fundamental freedoms than more dirigiste instruments, whose compatibility with the market economy concept of the internal market is questionable.[185] For reasons of legal systematics, the secondary law provisions of the EU Taxonomy Regulation cannot serve as a yardstick for the justification of the freedom of establishment under EU primary law.

180. In more detail E. Cohen, *La société à mission, La loi Pacte: enjeux pratiques de l'entreprise réinventée* (Hermann 2019); see already above I.1.a.bb; (n 51); on the *société à mission*, also H. Fleischer, 'Gesetzliche Zertifizierung nachhaltiger Unternehmen – Die französische "société à mission" als Vorbild für Deutschland?' (2021) 34 NZG 1525, 1526ff; J. Sahbatou, 'Nachhaltige Unternehmensführung in Frankreich' (2022) 2 EuZW 59, 61 and in detail C. Bochmann and S. Leclerc, 'Die Verankerung von Nachhaltigkeitszielen in den Gesellschaftsstatuten bei der französischen société à mission' (2021) 21 GmbHR 1141 .

181. In more detail Fleischer (n 179) 1525, 1527; Möslein and Mittwoch (n 7) 399, 412ff.

182. eg W. Frenz, 'Rohstoffe für die Energiewende angesichts des Russland-Ukraine-Kriegs' (2022) 7 Zeitschrift für das gesamte Recht der Energiewirtschaft 243; M. Ludwigs, 'Gewährleistung der Energieversorgungssicherheit in Krisenzeiten' (2022) 15 Neue Zeitschrift für Verwaltungsrecht 1086; D. Blöcher and T.R. Salomon, 'In Zeiten der Zeitenwende: Der russische Angriffskrieg gegen die Ukraine' (2022) Zeitschrift für das Gesamte Sicherheitsrecht Sonderausgabe 1.

183. See already above, I.1.

184. Engel and Haubner (n 73) 844, 848.

185. In this direction, for example, H.-W. Sinn, 'Grüne Kernkraft', (Finanz und Wirtschaft, 26 January 2022) <https://www.fuw.ch/article/gruene-kernkraft.>

Against the background of the tension between purpose specification and asset lock and the intrusiveness of specific sustainability criteria, it is to be expected that the ECJ will leave to Member States the option of innovating legal forms in order to promote sustainability. In the context of the proportionality test, the Court of Justice is known to leave a wide margin of discretion to Member States and to exercise control only in the case of manifest errors of judgment.[186] Since no clearly preferable regulatory instruments have yet emerged in the field of sustainability regulation,[187] this prerogative of assessment is particularly important. Far from being an obstacle to this prerogative,[188] different regulatory options are in fact a precondition for legislative discretion.

Even if there are no serious doubts as to the suitability and necessity of respective legal forms, lawmakers may, as a precautionary measure, consider explicitly emphasizing a reference to sustainability. In addition to corresponding explanations in the explanatory memorandum to legislative proposals,[189] a general program sentence in the text of the law can be considered, explaining that the legal form should contribute to the achievement of sustainability goals. One possible formulation would be: 'The legal form should enable sustainable, independent value creation within the limits of planetary boundaries, and, in particular, protect the trust of employees and customers in the long-term pursuit of these goals'.

bb) Safeguarding the Asset Lock

Since it is not the introduction of the new legal form per se, but in particular the safeguarding of the asset lock through the prohibition of (cross-border) conversions that is intended to have an obstructive effect, the suitability and necessity must also be examined in this specific respect.

The suitability of the conversion prohibition to ensure the preservation of assets in the long term is obvious (and it is explained in more detail in the German draft).[190] However, it is questionable whether the prohibition of cross-border conversions is necessary. Some of the foreign rules on asset locks provide for alternative safeguards in the event of conversion, each of which is designed to ensure that the asset lock remains in place. Such rules can serve as an orientation for the German lawmaker. Being a milder measure than the blanket prohibition that is proposed in the draft, the above-mentioned possibility of a restriction to related foreign legal forms can be considered. To the extent that there are no legal forms with full asset locks in other Member States, such a restriction is tantamount to a ban. Under these circumstances, at least, it is not necessarily a less restrictive measure. As for further alternative solutions, the legislator could, for example, consider a full exit tax for asset-locked companies, or conversion rules providing for a transfer of tied assets to charities or other companies with locked assets. However, any such solution would need to be

186. For example, O. Langner, 'Das Kaufrecht auf dem Prüfstand der Warenverkehrsfreiheit des EG-Vertrages' (2001) 65 RabelsZ 222, 242; S. Heselhaus, 'Rechtfertigung unmittelbar diskriminierender Eingriffe in die Warenverkehrsfreiheit – Nationaler Umweltschutz in einem unvollkommenen Binnenmarkt' (2001) 21 EuZW 645, 648.

187. On this diversity, most recently W. Schön, '"Nachhaltigkeit" in der Unternehmensberichterstattung' (2022) 2 Zeitschrift für die gesamte Privatrechtswissenschaft 207, 222-230; F. Möslein and K.E. Sørensen, 'Nudging for Corporate Long-termism and Sustainability? Regulatory Instruments from a Comparative and Functional Perspective' (2018) 24 Columbia Journal of European Law 393.

188. In this direction, however, Engel and Haubner (n 73) 844, 848.

189. Draft 2021, 11 ('in the context of the worldwide search for suitable legal forms for sustainable entrepreneurship'), 12 ('sustainable, purpose-oriented economic activity' is to be made possible) and 16 ('aim of sustainable development of the independent enterprise').

190. Draft 2021, 22, 100.

specifically assessed as to whether it would be equally appropriate and less intrusive than the current proposed regime.

III. Compliance with European Secondary Law

At the level of secondary law, the so-called Mobility Directive, which creates a European legal framework for cross-border changes of legal form, is a potential source of friction.[191] The Directive amends the Company Law Directive[192] with new rules on cross-border changes of legal form in Chapter I of Title II. These strictly limit restrictions on such changes of legal form by defining not only the procedure but also the addressees of the protection (shareholders, creditors, and employees) and the instruments of protection.[193] However, this legal framework only covers the transformation of the legal form of certain corporations into a corporation governed by the law of another Member State while preserving their identity (cf Art. 86a of the Company Law Directive). The conformity with European law of regulations on new corporate forms such as the GmbH-gebV, therefore, depends on whether the respective legal form falls within this scope.

According to Art. 86a (1) of that Directive, it is only relevant whether the new legal form qualifies as a corporation within the meaning of the Directive.[194] Both for the companies wishing to carry out the cross-border change of legal form and for the legal forms of the country of residence into which these companies are to be converted, Art. 86b nos. 1 and 2 CRD refers to the legal forms listed in Annex II. For Germany, these are the stock corporation (Aktiengesellschaft, AG), the partnership limited by shares (Kommanditgesellschaft auf Aktien, KGaA) and the limited liability company (GmbH). As a result, the GmbH-gebV could indeed be regarded as a legal form variant of the GmbH.[195]

However, it is by no means clear whether variants of the legal forms listed in Annex II automatically fall within the scope of the Directive. For example, the partnership limited by shares (*Kommanditgesellschaft auf Aktien, KGaA*), which is expressly covered, is a legal form variant of both the stock corporation and the limited partnership.[196] However, the latter, is undoubtedly not covered, if only because it does not count as a corporation.[197]

191. Directive 2019/2121 of the European Parliament and of the Council of 27 November 2019 amending Directive 2017/1132 as regards cross-border conversions, mergers and divisions, 2019 OJ L 321/1. The Directive would be the relevant yardstick with regard to European law if the new corporate form fell under it, see V. Obernosterer, 'Die GmbH mit gebundenem Vermögen – eine GmbH mit beschränkter Niederlassungsfreiheit' (2023) GmbH-Rundschau 434.
192. Directive 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law, 2017 OJ L169/46.
193. More closely J. Schmidt, 'Grenzüberschreitender Formwechsel in der EU: Eckpunkte des Rechtsrahmens und Herausforderungen bei der Umsetzung' (2020) 3 ZEuP 565; J. Brehm and K. Schümmer, 'Grenzüberschreitende Umwandlungen nach der neuen Richtlinie über grenzüberschreitende Umwandlungen, Verschmelzungen und Spaltungen' (2020) 14 NZG 538. See also the contributions in T. Papadopoulos, *Cross-Border Mergers: EU Perspectives and national experiences* (Springer 2019).
194. Schmidt (n 193) 565, 567ff; Brehm and Schümmer (n 193) 538, 539.
195. Engel and Haubner (n 73), 844, 846; see also Obernosterer (n 191).
196. J. Koch in *German Stock Corporation Act* (Uwe Hüffer & Jens Koch eds, 16th edn, 2022), section 278, para 3; A. Arnold in *Company Law* (Martin Henssler & Lutz Strohn eds, 5th edn, 2021), section 278, para 1.
197. On the non-extension of the directive to partnerships, J. Bormann and P. Stelmaszczyk, 'Grenzüberschreitende Verschmelzungen nach dem EU-Company Law Package' (2019) 7 ZIP 300, 302; W. Bayer and J. Schmidt, 'BB-Gesetzgebungs– und Rechtsprechungsreport zum Europäischen Unternehmensrecht 2018/19 – Teil I: Company Law Package' (2019) 34 BB 1922, 1926; M. Habersack, 'Sekundärrechtlicher ➤

Conversely, in France, for example, the *société par actions simplifiée (SAS)* is designated as an independent entity, although it can be understood as a legal form variant of the regular corporation (*société anonyme*). Formally, however, the *SAS* is regulated independently in French law.[198] Other legal form variants, such as the German *UG (haftungsbeschränkt)* or the French *société par actions simplifiée unipersonnelle (SASU)*, are designed in the same way, but whether they are covered by the Directive does not seem to have been discussed so far. Up to now, it has been assumed that even the cross-border nature of a change of legal form cannot change the fact that a German *UG (haftungsbeschränkt)* is excluded as a target legal entity under Section 5a (2) sentence 2 of the German Limited Liability Companies Act (GmbHG).[199] The new legal rules for the implementation of the Transformation Directive, which came into power on 1 March 2023, apparently does not intend to change this and does not provide for new regulations for the *UG (haftungsbeschränkt)*.[200] This indicates that the German legislator does not consider this legal form variant of the GmbH to be covered by the Directive (in contrast to the GmbH). A further indication that it is not covered is the fact that some legal form variants have been included in the scope of another company law directive, the Digitization Directive,[201] by an explicit mention in the annex, namely the *SASU* and the *entreprise unipersonnelle à responsabilité limitée* as a variant of the *société à responsabilité limitée*. The German *UG (haftungsbeschränkt)*, however, is not mentioned, but has been included in the new regulations by the German transposing legislator.[202]

All in all, as in the context of the freedom of establishment, it can be argued with good reason that legal forms such as the GmbH-gebV are, due to their autonomy, outside of the scope of application of Art. 86a (1) of the Company Law Directive. However, a separate legal form would also provide greater clarity in this respect. A non-inclusion in Annex II would possibly have to be coordinated at the Union level. In any case, under this premise, the new legal form is not threatened by any secondary law illegality despite the prohibition of cross-border changes of legal form.

Conclusion

The first part of this article has shown the variety of new legal forms that have been developed for long-term, purpose-driven enterprises, and for social entrepreneurship. These

grenzüberschreitender Formwechsel ante portas' (2018) 182 ZHR 495, 497; H. Heckschen, 'Grenzüberschreitende Sitzverlegung und grenzüberschreitender Rechtsformwechsel' (2020) 23 Zeitschrift zum Gesellschafts– und Wirtschaftsrecht 449, 452; H. Wicke, 'Optionen und Komplikationen bei der Umsetzung des Richtlinienvorschlags zum grenzüberschreitenden Formwechsel (Teil I)' (2018) 50 DStR 2642-43.

198. Fleischer (n 126), 827, 830; on SAS S. Jung, C. Kühl & L. Wohlgemuth, in S. Jung, P. Krebs and S. Stiegler (eds) *Gesellschaftsrecht in Europa* (Nomos 2019), § 13, para 633-714.

199. R. Ege and S. Klett, 'Praxisfragen der grenzüberschreitenden Mobilität von Gesellschaften' (2012) 48 DStR 2442, 2444; H. Wicke, 'Zulässigkeit des grenzüberschreitenden Formwechsels – Rechtssache "Vale" des Europäischen Gerichtshofs zur Niderlassungsfreiheit' (2012) 35 DStR 1756, 1758.

200. German Federal Legal Gazette (Bundesgesetzblatt, BGBl) 2023 I Nr. 51; J. Schmidt, 'Der UmRUG-Referentenentwurf: Grenzüberschreitende Umwandlungen 2.0 – und vieles mehr' (2022) 13 NZG 579.

201. Directive 2019/1151 of the European Parliament and of the Council of 20 June 2019 amending Directive 2017/1132 as regards the use of digital tools and processes in company law, 2019 OJ L186/80.

202. Section 2 para 3 of the German Limited Liability Company Act (GmbHG); on this inclusion, for example H. Heckschen and R. Klaier, 'Weitere Digitalisierung des Gesellschaftsrechts' (2022) 19 NZG 885, 892; C. Linke, 'Gesetz zur Umsetzung der Digitalisierungsrichtlinie (DiRUG)' (2021) 8 NZG 309, 310.

include special limited liability companies, associations, cooperatives, and foundations. In addition, most European legal systems offer special regimes or labels for social enterprises that can be adopted irrespective of the legal form. These new forms and regimes include not only special provisions on purpose (1), but also governance mechanisms (2) and often a partial or complete asset lock (3). The article then has briefly introduced the concept of steward-ownership and the academic draft law proposing its implementation as a sub-form of the German limited liability company. The draft provides for a complete asset lock and special governance tools to ensure that shareholders act as trustees of the company purpose, rather than investors seeking profit maximisation. The European definitions of social entrepreneurship require that the purpose of a social enterprise must be used for its purpose rather than distributed. Steward-ownership follows a similar approach, but allows entrepreneurs to freely choose the (legal) purpose to be pursued, going beyond a fixed list of traditional social enterprise purposes.

In the second part, this article has shown that the introduction of a GmbH-gebV with its characteristic asset lock does not raise any fundamental objections under EU law. Although the freedom of establishment is applicable, the safeguarding of the asset lock by the prohibition of a (cross-border) change of legal form does not constitute an obstacle as long as there is a lack of congruent foreign legal forms. Even if an obstacle to the freedom of establishment is assumed, there are strong arguments in favour of justifying such restriction to the freedom of establishment. In order to ensure compliance with EU law, the current draft should be improved during the legislative process: (1.) Instead of being a special form of the GmbH, the company with asset lock should better be designed as an independent legal form which could contain references to legal provisions of limited liability companies, foundations and cooperations. A new legal form would not need to be included in the Annex to the Mobility Directive (cf III.). (2.) The objective of the legal form, ie to enable sustainable, long-term value creation while preserving assets, and to ensure confidence in these objectives, especially among employees and customers, should be enshrined in the law itself as a mission statement and objective of the legal form. (3.) Contrary to the complete exclusion of conversion provided for in the current draft, cross-border conversion into other foreign legal forms of a similar nature – to be defined in more detail – should be permitted as long as the asset lock persists.