VIII. Towards a European Employee Stock Ownership Plan (European ESOP)

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1. Context and approach

In its 2020 SME Strategy (COM(2020) 103 final) the European Commission once more commits to facilitate business successions in the Member States of the European Union: *"It is estimated that every year, around 450,000 SMEs change ownership affecting more than two million employees. However, in a third of cases the transfer is not successful and, as a result, Europe loses around 150,000 enterprises and 600,000 jobs.*[405] *The reasons are often lack of early preparation, difficulty in finding a successor, and unfavourable tax and regulatory measures. The Commission will continue its work on facilitating business transfers and will support Member States in their efforts of establishing a transfer-friendly business environment.*[406]*"*

Against the background of the pressing problem of business succession this Chapter explores employee share-ownership schemes regarding their potential for business transfers. We propose a European approach, that is, a European Employee Stock Ownership Plan (EU ESOP). The Proposal is part of a wider initiative building on four Commission funded projects on EFP as well as a follow-up of a 2012 European Parliament study on EFP and a 2014 European Parliament Pilot Project implemented by DG MARKT.[407] It is a response to the Council Recommendation of 7 December 1994 "on the transfer of small and medium-sized enterprises"[408], Commission Communica-

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[405] Extrapolation based on Business Dynamics: Start-ups, Business transfer and Bankruptcy, Final report 2011.

[406] Directive on cross border conversions, mergers and divisions (EU) 2019/2121 adopted 27 November 2019.

[407] "Employee Financial Participation in Companies' Proceeds", J. Lowitzsch, I. Hashi et. al. 2012, Directorate General for Internal Policies, Policy Department A: Economic and Scientific Policy; J. Lowitzsch, I. Hashi et al., Study on the Promotion of Employee Ownership and Participation, DG MARKT Brussels 2014.

[408] 94/1069/EEC, OJ No C 400, p. 1; sales to employees were also defined a key area in the Final Report of the MAP 2002 Project, DG Enterprise, "Transfer of Businesses - Continuity Through a New Beginning", 2003.

tions[409], a 2003 European Parliament report[410], and a 2018 European Parliament Own-Initiative report[411] all explicitly calling for the sale of businesses to employees.

An ESOP is a financing technique that employs an intermediary corporate vehicle and facilitates the involvement of individual investors through a trusteeship. It is a type of investment transaction that may use external financing, thereby achieving the benefit of financial leverage. The ESOP was applied for the first time in 1956 with spectacular success in the US by its innovator, Louis O. Kelso, a business and financial lawyer turning the employees of a Californian newspaper chain into (co-)owners buying out the retiring owners. It is Kelso's best-known financial innovation, that until today enabled millions of American workers to become (co-)owners of their employer companies and is considered best practice for business successions. The ESOP repays the acquisition loan not from wages or savings but from the future profits of the shares acquired. Today the ESOP is an integral part of American corporate finance with around 6,467 plans, covering about 13.9 mln. participating employees holding around USD 1.833 trillion in assets as of 2020.

Share-ownership schemes[412] involving some sort of intermediary entity (special purpose vehicle) are the most sophisticated vehicles of employee share ownership. The cost of designing, implementing and eventually administrating such a scheme depends again on the chosen corporate vehicle. In the case of the US ESOP for example these costs may be considerable and, therefore, it is recommended for firms of medium size or larger. However, implementing business successions with cooperatives as intermediary entity or via Sociedades Laborales is also an option for micro-enterprises.[413] More generally speaking, a consistent and transparent regulatory framework is required to keep the costs of setting up a genuine ESOP or any similar entity as low as possible. In an ESOP, typically some type of share-based profit-sharing is combined with a fiduciary entity. The latter ensures an internal market for these shares so that they can be 'recycled' for the allocation to new employees, either sold by retiring owners or retiring employee shareholders.

As legal systems across the EU – despite harmonisation of company law – still have important differences often rooted in cultural and economic traditions, there is no one-size-fits-all concept for a European ESOP. An ESOP applied for business succession, therefore, has to be adapted to the regulatory environment of each Member State and to the specific needs of the given business succession setting which is what this Chapter does.

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[409] Reiterated in that of 28 March 1998 "on the transfer of small and medium-sized enterprises" (OJ C 93), that of 14.03.2006 "Implementing the Lisbon Community Programme for Growth and Jobs, Transfer of Businesses – Continuity through a new beginning" (COM (2006) 117 final).

[410] See Resolution of 5 June 2003; P5-TA (2003) 0253.

[411] The role of employee financial participation in creating jobs and reactivating the unemployed, European Parliament resolution of 23 October 2018 on the role of employee financial participation in creating jobs and reactivating the unemployed (2018/2053(INI)).

[412] For the purpose of this comparative discussion, we distinguish between a) direct individual share ownership as, e.g., in employee stock purchase plans, b) individual share ownership mediated through a SPV providing individual claims over reinvested net income through individual capital accounts, e.g., in a US-ESOP, and c) indirect collective share ownership as in an employee ownership trust where no individual has an interest in a specified allocation of shares.

[413] Coop legislation exists in all EU Member States. Low-threshold limited liability companies are today recognised in most of the Member States; see Lowitzsch, Dunsch, Hashi (2017), Annex II.

a) Aim and Ambition

Different legal systems offer different legal solutions for the required utility of a business succession tool involving ESO plans facilitating substantial participation in equity by all or the majority of the employees of a firm. The various underlying concepts may at time be confusing as they involve seemingly similar terms for, however, at times different outcomes. A prime example is the difference between the Anglo-American institution of the trust and its civil law fiduciary counterparts, be it an alternative – albeit very similar – concept as the German Treuhand or an emulation as the French Fiducie introduced in 2007. While trust law is based on the concept of split ownership the latter have a similar utility but differing underlying concepts, both more limited and less complex, variations, which, however, for the purpose of the European ESOP constitute no obstacle.

Instead of trying to describe the functionality of each legal concept in detail requiring an in-depth comparative legal analysis that would not serve the purpose of this Chapter, i.e., to formulate a policy approach, we chose a functional analysis following the main objectives of the variants of the ESOP concept. The European Employee Stock Ownership Plan in this context should, thus, be understood as an umbrella term for a business succession concept based on employee share ownership that – depending on its finality – may take different legal corporate forms; when we refer to the original ESOP, invented by Louis O. Kelso in the 1950s we speak of the US ESOP. Said structural distinction according to the desired function most importantly pertains to the three following issues:

(i) Type and way of distribution of benefits to the employees involved, i.e., whether

- it concerns a company's equity itself (or at least allowing capital appreciation rights) or the profits of the undertaking;
- it is immediate, deferred or in connection to a specific purpose, e.g., retirement.

(ii) Flexibility of the framework conditions, i.e., whether they

- are durable and cannot be undone by the contracting parties without approval of the fiduciary, or can be conceptually changed by the will of the plan participants;
- are compatible with other types of owners, (e.g., entry of external investors).

(iii) To what extent employees participate in decision-making.

In practice, there are seven types of legal vehicles that lend themselves to realise above mentioned different objectives, namely the Anglo-American trust, be it an employee stock ownership trust (ESOT) or an employee ownership trust (EOT), the French employee ownership mutual fund (EOMF, in French FCPE), the Austrian civil law foundation, the Spanish Sociedad Laboral (SL), the cooperative (COOP), and the closely held limited liability company (LLC, implemented in an ESOP context in combination with a fiduciary). Each of these legal vehicles – depending on the country of operation and the corresponding regulatory environment – can be employed to implement the European ESOP to realise the different desired functions according to their inherent characteristics.

Table 15 gives a generalised overview of the prevalent functional settings, but it has to be kept in mind that in some cases combinations are possible. Furthermore, the

question of implementation cost which, depending on the vehicle and the governance model, can be significant[414] is the more general issue concerning company size is. However, the costs of setting up the corporate vehicle have to be compared to those of the operation of the ESOP variant; while for example the setting up of a trust may be costly the administration of accounts and share transfers are associated with limited costs. This is illustrated by the contrast to LLCs as ESOP vehicle, where the notarial certification of share transfers (which in some countries like Italy and France is not an obstacle anymore) has been an obstacle to ESO in SMEs and thus to ESOP implementation (this led to fiduciary solutions, discussed more in detail below under c)). Therefore, the row on implementation cost should be treated with caution.

Table 15: Overview of legal vehicles according to desired function of the EU-ESOP

Legal vehicle / Function	US, UK, IR, Malta		Civil Law countries				
	EOT	**ESOT**	**Foundation**	**EOMF (FCPE)**	**Cooperative**	**Sociedad Laboral (SL)**	**LLC + fiduciary**
Distribution of profits: equity vs. cash	cash	equity	cash	equity	capital appreciation*	equity	equity
Benefits: immediate, deferred, tied to aim	immediate	deferred, at retirement	immediate	deferred	partly deferred	immediate	deferred
Durability	perpetual	dispositive	perpetual	dispositive	perpetual	dispositive	dispositive
Changeable by participants	no	no	no	no	no	yes	depending on statutes
Participation in decision making	defined by statutes	defined by trust deed	delegated / defined by statutes	delegated representation	one-member-one-vote	voting proportional to shares held	defined by fiduciary agreement
Compatibility w. other owners	low	medium	medium	high	medium	medium	high
Cost: Implementation / operation	high / low	high / medium	high / medium	high / medium	low / low	low / low	low / medium

Source: Own elaboration. * As in cooperatives membership is not based on share ownership it is more correct to speak of capital appreciation rights here.

b) Conveying Employee Share Ownership through an Intermediary Entity

In countries with an Anglo-American legal system the intermediary entity conveying employee's interest is a trust. In countries with continental legal tradition the intermediary entity is a special purpose vehicle that can have different legal forms, most commonly a closely held limited liability company, be it generally or in the specific case of a Sociedad Laboral[415], an employee buy-out mutual fund[416], a cooperative[417] or

[414] For a medium-sized US ESOP, the installation costs are about USD 40,000 with the annual administration costs, including appraisal, ranging to about USD 15,000. For smaller firms the on-going annual appraisals cost around USD 5,000. Information provided by Menke & Associates, Inc., San Francisco, CA.

[415] The Sociedad Laboral as a LLC is suggested here as a concept for business succession in micro-enterprises where the target company of the buy-out is a partnership or a single owner.

[416] Above all the French "FCPE de réprise", an employee buyout mutual fund specifically designed for enterprise successions. Fonds commun de placement d'entreprise or FCPE are a specific type of Undertakings for Collective Investments in Transferable Securities (UCITS) at enterprise level reserved to its employees; at the EU level UCITS are regulated by Directive 2001/107/EC and 2001/108/EC.

[417] For a technical description of the Slovenian Coop-ESOP, see Ellerman, Gonza, Berkopec, (2022); available at: https://link.springer.com/article/10.1007/s43546-022-00363-7.

a foundation.[418] The choice of the legal vehicle depends on (i) the tradition and customs of company law, (ii) the overall aim agreed between the employer and the employees and (iii) on the regulatory framework conditions in the given country.

All entities but the trust inherently carry a different extent of membership rights for the participating employees which ranges from delegated representation for the foundation and the buy-out mutual fund, shareholder rights pro rata for the LLC (modified via the fiduciary relationship) and the one-member-one-vote rule for the cooperative; in the case of trusts the extent of the membership rights is stipulated in the trust deed or the statutes. The absence of trust legislation creates two additional challenges that need to be resolved if the intermediary entity is a) a corporation by shares: the fungibility of the shares avoiding registry and notarisation fees (easy transferability); b) a cooperative or a foundation: the liquidation of the capital interest of the participating employees (cashing out).

The trust has the advantage of combining the functions of share acquisition (possibly leveraged using single source financing) and administrating the equity interest (in the case of the ESOP as legal owner for the employees as beneficial owners). The buy-out mutual fund, the foundation, and the cooperative yield a similar result where the intermediary entity alone provides the vehicle for the buy-out and the instrument for the administration of individual capital accounts including facilitating changes amongst the participating employees. Only the closely held limited liability company as intermediary entity requires an additional contractual fiduciary to ensure both functions while ensuring reasonable transaction costs.

c) Excursus: Adapting the trust to continental law – Closely held limited liability company in combination with a fiduciary

The LLC coupled with a contractual fiduciary requires two corporate entities since the fiduciary for liability reasons as a rule will not be a physical person[419]: (i) a holding LLC that acquires the shares from the retiring owner and (ii) a fiduciary LLC that holds the shares of the holding LLC on behalf of the employees. Similar to a trust, in the case of the LLC coupled with a contractual fiduciary it is the fiduciary relationship that – if desired – enables a cautious and gradual transfer of involvement in management decisions while the responsibility for day-to-day decisions of business operations stays with skilled management (Kelso, Hetter Kelso 1991). The fiduciary relationship is thus also a tool for professionalization of decision-making processes on the part of employees, which at the same time ensures that employees vote their shares together (en bloc) after an internal consultation advised by an expert.

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[418] It is important to emphasise that, although the statutory law governing these different types of entities is much harmonised across the EU, important differences persist. Therefore, the solutions described in this contribution need to be checked against the relevant national legislation of a MS in which the EU ESOP is to be implemented in particular as regards the rules pertaining to a) transferability of shares including the related transaction costs; b) the decision-making rights tied to the ownership interest held; c) where applicable, the (contractual) fiduciary relationship between employees and fiduciary.

[419] The fiduciary typically takes the form of a fiduciary LLC administered by a managing director (Lowitzsch, Kudert, Neusel 2012). In this case the fiduciary entity has only one shareholder (i.e., its founder, often the initiator of the ESOP) shown in the list of shareholders at the registry court, with its sole purpose to represent the shareholding of the employee-shareholders in the holding LLC that acquires the shares of the employer company. The establishment of the holding LLC as intermediary entity follows the conclusion of fiduciary contracts between the employees as trustors and the managing director representing the fiduciary entity. From a tax point of view the fiduciary entity is transparent as it is the employee-shareholders who are the economic owners of the shares.

A fully fledged fiduciary shareholding occurs when a shareholder (here the fiduciary entity, i.e., the fiduciary LLC) owns the shareholding for the account of one or more other entities (here individual employee-shareholders) in the sense that he is entitled to the rights arising from the shareholding only in accordance with a fiduciary contract concluded with the employee plan participants (Criddle, Miller, Sitkoff 2019). As in the case of the ESOP trust (but unlike an “authorisation trust” or the “power of attorney trust”) in this case the separation of the trustee's external legal competence from his internal fiduciary duty is accomplished. The fiduciary entity has a dual role: a) in relation to the other shareholders (e.g., retiring owner, other shareholders of a family business, or strategic investors) she is the holder of the shareholder rights; and b) in relation to the participating employees as holders of the equity interest she is entitled and obliged to exercise these rights for their account. The employees can be described as holders of shareholder rights merely in the economic sense of the term. The fiduciary LLC is in every respect carrier of the membership rights (i.e., shareholder) and, consequently, it is the fiduciary LLC that is shown in the list of shareholders of the employer company.

d) Methodology

Before designing a flexible model regime for a European equivalent offering (a European ESOP) as a starting point one needs to examine to what extent the key elements of such a scheme are already regulated in the 27 Member States of the EU and the UK. Taking into account the different existing national rules on EFP in general and employee shareholding in particular is essential in order to develop a new European regulatory model, one that is both practicable as well as appealing to existing owners, workers and companies alike. Only if the rules of the European ESOP correspond with the practices and the requirements that need to be met in the Member States, will it find acceptance among employees, employers, and governments. The comparison of the different national regulations is based on the PEPPER country profiles updated as of September 2023 bundling information on the incidence of EFP schemes and on the respective legal and fiscal framework in each Member State.[420] A detailed illustration of the national regulatory frameworks decomposed regarding the mentioned categories can be found in Part 2 Chapter VI 1-28 of this report. This Chapter provides a summary of this comparison, emphasizing the existing differences and similarities that exist among Member States in reference to the regulation of ESOP schemes.

The following analysis includes only legislation currently in effect. Regulation that has been abolished either recently or already many years ago – as is the case in Denmark or most Central- and Eastern European countries – is not considered. Further, specific national schemes that exist in only one Member States and lack any resemblance with schemes in other countries are only incorporated insofar as they can be integrated into the developed system of categories. Finally, a number of countries do not provide any regulation on ESO or have only relatively few rules on the issue. Accordingly, they will be underrepresented in this comparison, while the analysis will be dominated by a smaller number of countries that have comprehensive legal frameworks on ESO. The results of the following examination of regulations will thus not suffice to design one of

[420] The country profiles have first been drafted in the context of the PEPPER III Report in 2006 and have subsequently been extended and updated on a regular basis by respective national experts. The profiles are also available for the UK and the US.

the possible European ESOP types, but they may well serve to choose the most suitable legal vehicle depending on the desired purpose.

2. The challenge: business succession in European SMEs

a) European Commission initiatives

Following the 1994 Council Recommendation on the transfer of small and medium-sized enterprises (SMEs)[421] a Commission Communication from 2006[422] stated that with the aging of Europe's population, *"one third of EU entrepreneurs, mainly those running family enterprises, will withdraw within the next ten years"*. This portends an enormous increase in business transfer activity affecting up to 690,000 SMEs and 2.8 million jobs *every year*.[423] Transfers to employees as a specific measure for facilitating business succession in SMEs has been highlighted as one of the main objectives of said 1994 Recommendation and in 2002/3 by the European Commission, explicitly stressing the importance of ownership.[424] The European Commission has worked on business transfers for over 25 years including it as a strategic issue in key milestones in EU initiatives as the Small Business Act (2008), the Entrepreneurship 2020 action plan (2013) and the SME strategy (2020).[425] Although an ESOP can be used to provide a minority financial stake to employees, as a business succession solution the main design requirement of the European ESOP must be one that can acquire and hold a majority or 100% interest in a trading company or group on behalf of all of its employees.

It is anticipated that because of the new forms of business finance now coming into use, transfers within the family will decrease, while sales to outside buyers will rise. The entrance of international investors into what used to be primarily domestic markets will broaden the range of potential buyers for European SMEs. But these enterprises are the backbone of Europe's national economies, cultures and traditions. Their sale to impersonal Private Equity funds[426] and strategic investors will affect not only the working lives of Europeans, but also their material well-being and the quality of their communities. This process is likely to threaten the successful regional structure

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[421] On the transfer of small and medium-sized enterprises, 94/1069/EEC, with explanatory note, Official Journal No C 400, 31. 12. 1994, p. 1; reiterated in the Communication from the Commission on the transfer of small and medium-sized enterprises, OJ C 93, 28.3.1998.

[422] Implementing the Lisbon Community Programme for Growth and Jobs, on the Transfer of Businesses – Continuity through a new beginning, from 14.03.2006 COM(2006) 117 final.

[423] Calculated by Extrapolations from the final report of the BEST-project on the transfer of small and medium-sized enterprises, 2002, which estimated that the annual transfer potential for the EU 15 was 610,000 businesses. E.g., the Transfer volume of enterprises is estimated for Germany around 354,000 over the next five years (Institut für Mittelstandsforschung, Bonn, 2005), for France around 600,000 for the next decade (Vilain, La transmission des PME artisanales, commerciales, industrielles et de services, avis et rapport du conseil économique et social, 2004). Final Report of the MAP 2002 Project (2003).

[424] One of the key areas defined in the Final Report of the MAP 2002 Project, *European Commission Enterprise Directorate-General*, "Transfer of Businesses – Continuity Through a New Beginning", 2003.

[425] The Commission put forward an SME strategy for a sustainable and digital Europe on 10 March 2020 with the aim to make Europe the most attractive place to start a small business, make it grow and scale (COM(2020) 103 final).

[426] The Volume of Private Equity transactions in Europe has been rising over the last years with 126 billion Euros in 2005 and a new peak of 178 billion Euros in 2007; source: Incisive Financial Publishing, 2007.

of European (family-owned) businesses[427] and will profoundly affect the European Community itself – its values, its vision and its effectiveness.

The growing number of Private Equity firms targeting Europe's small and medium-sized enterprises[428] makes a comparison of an alternate leveraged buy-out tool of immediate strategic importance. This alternate vehicle is the Employee Stock Ownership Plan. Although the ESOP and the Private Equity fund have some features in common[429], the two markedly differ in one crucial respect: they benefit different constituencies and have different economic and social effects. The Private Equity buy-out concentrates ownership of productive enterprises and the income they produce, while the ESOP broadens both the economy's ownership base and the distribution of income. The Private Equity buy-out increases the wealth of its own narrow constituency, while the ESOP improves the material well-being and economic security of working people and their families. The Private Equity buy-out is a short-term transaction aiming at restructuring and selling the target company to a third party – that, in turn, may be just another Private Equity Fund. The ESOP is a long-term commitment which ensures the continuity of the enterprise.

Quick profits for a few investment consortiums, whose participants are already well-capitalized, or incomes rising over time for employees motivated by the ESOP to make their enterprises more profitable and competitive? This is the choice confronting the European Union as it prepares for a massive transformation of ownership of the business enterprises that generate its economic prosperity.

b) The US ESOP as best practice for business successions

A full or partial ESOP buy-out provides an ideal vehicle to facilitate transitions in ownership and management of closely held companies. The ESOP creates a market for retiring shareholders' shares, which is of major importance to unlisted SMEs having no other ready source of liquidity. Moreover, ESOPs may easily buy-out one or more shareholders while permitting other shareholders to retain their equity position. This is one of its major advantages from the shareholders' perspective. At the same time, ESOPs give business owners the opportunity to diversify their investment portfolios without the costly process of going public (for US-ESOPs, see Ackermann 2002). There is no dilution in equity per share of current stockholders since no new shares are issued and all shares are bought at fair market value.[430] Finally, an ESOP is a sustainable alternative to a private-equity buy-out, generally considered short-termed and sometimes harmful to the interests of the employees and the well-being of local communities (Appelbaum and Batt, 2014).

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[427] Germany's Mittelstand - an endangered species? Focus on business succession, Deutsche Bank Research, current topics 387, 29.5.2007, p.1, download at www.dbresearch.de. See also "PES Priorities for the EU policy agenda 2008", adopted at the Party of European Socialists Leaders' meeting 21st June 2007, p. 3.

[428] The part of LBOs in the total funds raised in Europe reached over 68% in 2005. In contrast the amount of venture capital investments only represents 5%. See "Hedge Funds and Private Equity - a Critical Analysis", PSE Socialist Group in the European Parliament, 2007, p. 69.

[429] The ESOP, invented in 1956, is the prototype leveraged buy-out; the Private Equity form originated in the seventies to utilize tax advantages which the US Congress had passed to encourage the ESOP.

[430] Theoretically, there is a temporary loss in the potential of the company caused by the obligation of the loan, since the borrowed funds used for the buy-out otherwise might be used to finance further growth. It is unlikely, however, that a trade sale to an outsider, if at all possible, would trigger the same increase in productivity and profitability as a result of higher employee motivation.

Leveraged employee share ownership, on the other hand, as in the case of ESOPs, involves an additional element of risk. Whereas profit-sharing plans represent a variable financial burden, leveraged schemes require fixed loan amortisation payments regardless of the company's financial performance - a condition similar to taking on debt. In fact, such loans are treated as a liability if the company guarantees the loan or commits to future contributions to service it. Thus, if a company is not growing or becomes unprofitable, the repayment liability can threaten its ability to survive. Furthermore, in US ESOPs closely-held companies usually are obliged to purchase the shares of departing plan participants because of the absence of a public market for their stock (so called repurchase obligation).[431] In such a case the repurchase liability in a successful company generally increases over time as the appraised value of the company's stock rises, although it does not usually increase as a percentage of the company's free cash flow.[432] If a company does not plan adequately to meet this liability, it may be forced to make a public offering of its stock to eliminate the repurchase obligation, an expedient which is not only very expensive but also involves a loss of control and independence and the loss of opportunity to future employees (Smith and Burt 2009).[433] A better alternative is the creation of a "sinking fund", although in small companies it may be difficult to develop accurate actuarial assumptions (Ackermann 2002). Where a relatively large portion of the re-purchase liability is attributed to a few plan participants, the use of life insurance may be appropriate (Bye 2002).

Thus, the ESOP may be an attractive alternative to selling the business to outsiders, especially when there is a desire to keep control of the business within a family or a key-employee group.[434] As a trusteed plan, the US ESOP is designed to professionalise participation of employees in strategic questions while not requiring them to be involved in decision-making on a day-to-day basis. The trustee exercises the voting rights while the employees are the financial beneficiaries of the trusteed entity; of course, the board of directors should be able to elect, recall and change the trustee should they wish so.[435] Independently plan participants have delegated voting rights on a number of strategic issues like, sale of the stock of the company to a third party, a merger, recapitalisation or liquidation of the company. When transferring the US ESOP to European or other countries, however, different forms of the fiduciary entity will have different effects on governance depending on legal framework and the needs of the given succession setting. For smaller firms especially, it is much easier to con-

[431] If local company law, as in the US, or bylaws of the company requires this. In Ireland, for example, departing employees have no right to be bought out at market value.

[432] The percentage of a company's free cash flow which will be required to service the repurchase liability on average over a period of years is fairly constant unless the multiple of the company's earnings (price / earnings ratio) alters dramatically. The average company will require cash equivalent to 7.5% of the value of the allocated stock in the trust for repurchase liability purposes each year. This is equivalent to a 7.5% dividend on the stock, but only on the stock already allocated to employee accounts in the trust (Lyon 1989).

[433] Thus, the ESOP transaction should be modelled in advance to ascertain that the company can afford this amount of "dividend". Otherwise, there should be a limit on how large a percentage of the company's total stock may be acquired by the ESOP. A growing company may require almost all of its free cash flow to fund future growth, but a company growing this fast may well want to go public.

[434] The ESOP may also be used to buy out dissident shareholders.

[435] In the US the trustee may, in fact, be the very person who has just sold some or all of his shares to the trust thanks to the strict rules of trust law Ireland, Malta and the UK; in countries without trust legislation, i.e, the broad majority of EU Member States this, however, would collide with corporate governance and corporate law and thus would be not admissible.

template a gradual transfer of ownership by creating a market for the shares of those who wish to sell at the present moment, while enabling those who wish to hold their shares to retain their equity interest permanently or at least until some later date. The result is the opportunity of gradually cashing out without giving up immediate control.[436] The virtue of an ESOP is that it can easily accomplish a 100% buy-out over time without subjecting the company at any given moment to 100% leverage.[437] For that reason, the ESOP has been called the "*ultimate instrument for succession planning*" in the US (Frisch 2001).

As of 2020, the number of US ESOPs was 6,467 with 13.9 mln. participants holding USD 1,833.8 bln. in assets (see US Country Profile). Over the last decades the population of US ESOPs is relatively stable with little positive dynamic, and while many new ESOPs are created annually (NCEO reports that in 2019, 239 ESOPs covering 46.537 employees were created), a similar number is terminated every year. One explanation is that the population of mature SMEs seeking for a successor – and consequently that of companies suitable for an ESOP – is relatively stable over time. Another reason that their population was not growing recently is market consolidation with a large number of firms being bought by private equity firms resulting in a 50% drop in the number of independently privately owned companies over the last decade.[438]

3. Defining the core elements of an ESOP

ESOPs as a rule are funded by the company either contributing shares to the plan, contributing cash that the plan uses to buy shares, or by having the plan borrow money to buy new or existing shares. The schemes may be combined (Shannahan and Hennessy 1998), resulting in the following essential structure:

- The company establishes a fiduciary entity in favour of its employees.
- The fiduciary entity is usually financed by a combination of company contributions and borrowings. Company contributions often are part of a profit-sharing agreement with the employees. The fiduciary entity may borrow money directly from a bank or from the company, which in turn may take a loan from a bank or other lender. Shares are either acquired directly from the existing shareholders or by means of a new share issue. The loan taken on by the fiduciary entity is usually guaranteed by the company, but in some cases, it is without recourse to the company.
- The shares are first held collectively in the trusteed entity and are only allocated to individual employees' accounts, or distributed, after a particular holding period. This holding period may be either a matter for the trustees to determine, or it may be driven by the need to repay borrowings before distributing shares or by tax holding periods before the shares can be distributed free of income tax. Most commonly, it is a combination of all three.

[436] Once the loan is paid off, of course, most companies make some arrangement for the presence of employee representatives on the plan committee.

[437] One hundred percent buyouts are very difficult for most companies to finance without a significant part of capital from lenders who demand a very high rate of return (35%-40%). The costs for arranging the financing can amount to millions of Euros, which is certainly beyond the range of SMEs.

[438] Rooting in the fiduciary duties towards the beneficial owners ESOP fiduciaries must accept an offer above ESOP share price which led to many acquisitions.

- When a share-based profit-sharing scheme is used to distribute the shares, the shares are usually transferred by the fiduciary entity to the profit-sharing scheme without the profit-sharing scheme being required to pay for them (see the French FCPE for example). Alternatively, the company can make a payment to the profit-sharing scheme to allow the scheme to acquire the shares from the trusteed entity (as with US 401 plans).
- The loan may be repaid by direct cash contributions from the company to the fiduciary entity, or dividends on the shares held in the fiduciary entity.

a) Fiduciary Entity

Unlike a pension plan, which as a rule requires diversification, an ESOP is specifically designed to hold employer securities via a fiduciary entity. In Anglo-American countries the fiduciary entity is typically a trust; in countries with a different legal tradition, it can take the form of any other intermediary entity that can serve as a trusteeship. An ESOP can be used by a company which does not have a listing for its shares to create an internal market for the employees to buy and sell the company's shares. This can be done if the ESOP both distributes shares to the employees and also operates a market whereby employees can sell their shares and acquire further ones. The ESOP can provide liquidity to this internal market if it is also a buyer of shares in this internal market. The shares which the ESOP buys will then be distributed to employees in subsequent distributions. The creation of a market for the shares of an otherwise illiquid company makes the ESOP a financial tool which benefits both employees and the employer company.

As mentioned, the fiduciary entity can also be an entity different from a trust, e.g., a limited liability company or a cooperative, which, however, has implications for the taxation of individual employee-owners and their corporate rights (see Sections 1 b) and c) above). The choice of the form the fiduciary entity takes will depend in large part on the national regulatory framework but also on the specific succession setting and on how different types of fiduciary entities are perceived by the social partners in a given country. Regarding a cooperative, for example, the one-member one-vote principle may be seen as an obstacle where business owners and/or participating employees prefer voting rights proportional to their shareholding. (Of course, it should be stressed that – independently of the choice of the intermediary entity – voting is proportional to shareholding at the level of the operating company.) The European ESOP therefore only defines a generic standard special purpose vehicle, but with a distinct governance structure allowing for the execution of voting rights of the employee shareholders. The fiduciary agreement defines which decisions are retained by the employee shareholders and which are delegated. Typically, decision making for day-to-day operations will be left to the fiduciary together with the retiring owner and its management (i.e., the shareholders of the operating company). Thanks to professional advice and clear and simple rules, time-consuming involvement or expert-knowledge for strategic decisions is not required. While being protected from manipulation, at the same time, employees can gain knowledge from their active involvement; an example of such an apprenticeship is the introduction of open book management which requires training.[439]

[439] See Jack Stack with Bo Burlingham (2013) “The Great game of business”.

b) Leveraged or not leveraged financing

An important feature of an ESOP is that it can be leveraged by taking out a loan or issuing a seller note to buy shares in the employer company. This leverage potential is most important because it can accommodate large transactions for the company and its shareholders while creating particularly sizeable capital ownership in employee accounts. The ESOP debt is funded by appropriately timed contributions from the company to the trusteed entity. Of course, any dividends earned by the stock may also help to pay off the loan, but this is more of a complementary element.[440] As with any other bank loan, ESOP loans must be repaid regardless of whether the dividends on the stock are sufficient to pay off the loan. By making the loan payments tax deductible to the corporation, as, e.g., in the US, the loan is repaid with tax-free income, in contrast to a conventional re-capitalisation loan that must be paid back with after-tax income (for US ESOPs, see Bachman and Butcher, 2002). Utilizing corporate credit to guarantee the loan which funds the acquisition of employee shares by the fiduciary entity and writing off loan repayments as expenses deductible from taxable corporate income substantially reduces the financing costs. Given the additional advantage that the shares are not sold to outsiders, thus eliminating the risk of loss of control, the ESOP solution in most cases will be preferable to a conventional bank loan. Of course, any of the objectives of an ESOP resulting in any percentage of shareholding from 1% to 100%, can be achieved on an unleveraged basis over time.

In a variation of the described loan structure in the US ESOP lenders often prefer to make the loan directly to the company, followed by a second "mirror loan" from the company to the trust (with the same tax results as in the case of a direct loan to the trust). The same can apply in a EU ESOP with the company making annual payments to the fiduciary entity in amounts sufficient to amortise the internal loan (from the company to the fiduciary entity). The amounts paid by the ESOP to the company to amortise the internal loan should – national tax law permitting – usually constitute tax-free loan repayments and can be used by the company to amortise the external bank loan. The "mirror loan" structure provides the lender with a stronger security interest in the assets pledged to secure the loan. In the case of default, the lender will be in a better position to defend against claims of fraudulent conveyance if it has taken collateral directly from the borrower rather than from a guarantor of the loan.

An ESOP, considered only as an umbrella term to cover a fiduciary entity set up by a company to put shares in the hand of its employees, is similar in many ways to a share-based profit-sharing scheme, but most importantly is not as limited. While the latter has only one source of funds (i.e., direct contributions from the employer company), the ESOP can be financed from such different sources as:

- A loan from the employer company, from a selling shareholder or from a financial institution such as a bank;
- Dividend earnings;
- Sale of shares to its related share-based profit-sharing scheme;
- Contributions from the employer company.

[440] If the P/E ratio is 5 and the interest rate is as low as 5%, a standard 7-year level-principal loan amortisation schedule would require P/7 + P x .05 or almost a 20% dividend in year one to service the loan.

Neither the US nor the European ESOP are based on employees personally making share purchases out of their salaries or other income.

c) Individual indirect employee ownership and individual capital accounts

The ESOP introduces two central features to a successful ownership scheme – it individuates shares to employees in the company and holds shares in a separate legal vehicle.[441] The first technical element is individual capital accounts (ICAs), designated to each ESOP participant. ICAs allocate the individuated claim over the net asset value or the market value of the shares of the underlying company held by the ESOP vehicle.[442] The system of ICAs allows employees to cash out the reinvested value after they exit or retire. While the claim over the reinvested value is personal to each ESOP participant, he or she does not hold the shares directly but through the intermediary fiduciary entity. Consequently, employees enjoy the right to income and capital appreciation of the shares, but transactions in the shares are regulated by the intermediate vehicle restricting individual transactions (Ellerman, Gonza and Berkopec, 2022).

The use of an intermediate vehicle, as well as simplifying administration of the shareholdings, can ensure the sustainability of employee shareholding. Experience from the privatization in the East and Southeast Europe (Ellerman and Stiglitz 2001) shows that if workers hold shares directly, they are inclined to sell or trade the shares under soft or hard pressures of external stakeholders. Rather than selling to outsiders, the ESOP buys back the shares and allocates them to current workers' ICAs. In this way, ownership is anchored with the current generation of employees, who at the same time are members of the local community. Rather than being dispersed, ownership remains with the local community, which aligns the interest of the business with that of its surroundings, leading to socially and environmentally responsible practices (Boukhima and Khallouki 2022; Burgess 1999; Hübner 2020; Sahasranamam et al. 2019; Stranahan and Kelly 2020). To maintain the sustainability of the ESOP structure legislative safeguards in the case of ESOP sell-outs, for example tax-clawbacks or requiring a large majority of employees to agree to the sale of ESOP stock should be considered. In summary, an intermediate vehicle can help prevent sales to outsiders as well as concentration of shares with management.

d) Roll-over mechanism vs. repurchase liability

The US ESOP originates as a special type of retirement plan typically with a repurchase obligation once employees exit or retire (see Country Profile US).[443] With long-established pension systems across Europe the EU ESOP is not primarily designed as a complementary element for retirement and thus not tied to a repurchase obligation. Contributions are scheduled to initially repay the loans/notes and subsequently to ensure new employees that decide to participate in the EU ESOP can acquire shares and those exiting are bought out (also mitigating the stochasticity behind repurchase obli-

[441] Both crucial elements to prevent the failures of the historical "socialized" employee ownership models in Central Eastern Europe or those of "direct" employee ownership following during privatisation.

[442] This claim over the net asset value presents a solution to the famous critique of self-management introduced by Furubotn and Pejovich (1970), since workers maintain the claim over the net income after it is reinvested (Ellerman 2020).

[443] There are provisions allowing a part of the shares to be repurchased after the beneficiaries reach age 55 and in individual cases ESOPs were structured permitting employees to access ICA liquidity before retirement.

gation in the US ESOP) (Ellerman, Gonza, and Berkopec, 2022). Unlike the US ESOP, the EU ESOP can foresee a "roll-over" mechanism to stretch the repurchase liability evenly through time:

(i) ESOP contributions continue on a regular basis after the bank loan and/or note to the seller has been paid fully. In that moment, all the shares are allocated to ICAs and there are no shares left in the suspense account.

(ii) The intermediary fiduciary entity maintains liquidity through controlled cash flows from the employer company, which it uses to repurchase the oldest ICA shares from the employees on a first-in first-out basis.

(iii) As the oldest shares are repurchased from an ESOP participant (independently whether still an employee or not), these shares are redistributed to the active ICAs held by employees still with the company. Employees who left the company are excluded from new share (re-)distributions and are gradually paid out within the rollover system. When a new employee or a current employee decide to participate in the ESOP, he or she receives the shares re-allocated.

Since ESOP contributions are determined based on annual financial capabilities of the employer company and determine the size of the repurchase liability, the roll-over system ultimately controls for the liabilities. In other words, the ESOP contribution determines the repurchase obligation and not vice versa. At the same time, the rollover system solves the problem of “cashing out” when the intermediary entity is a cooperative or a foundation and allows equalising the ICAs among younger and older members, distributing risk more evenly. Finally, it gives the younger workers a more tangible motivation since they start receiving payments sooner.

4. Tailoring ESOP mechanisms to specific aims

Based on the main ESOP principles described in the preceding Section, each of the legal vehicles introduced in the introduction (see Table 15) can be employed to implement a variant of the EU ESOP depending on the desired setting and objective. To illustrate the key differences between the ESOP variants presented in this Chapter this section provides examples of how the ESOP mechanism can be tailored to specific aims; the choice of the examples is, of course, not exhaustive and above all serves the purpose to illustrate the great adaptability of the ESOP concept.

a) Indirect collective share ownership in EOTs

In 2013 the British Government reformed the Companies Act 2006 in favour of ESO plans and in 2014 introduced tax exemptions for “indirect” ownership of shares on behalf of employees, through Employee Ownership Trusts (EOTs). The EOT is a more restrictive form of the employee trust more commonly used in the United Kingdom (the so called “section 86 trust” because it meets the requirements in section 86 Inheritance Tax Act 1984). The differences between an EOT and a section 86 trust are acceptable in the context of a trust that is designed to acquire, and hold shares indefinitely on behalf of the employees. One additional restriction is that the EOT must not include a power for the trustee to make loans to beneficiaries. A key difference relates to who must benefit from any distribution from the EOT. A section 86 trust usually defines its beneficiaries by reference to employment with a particular body but can limit the class of beneficiaries to ‘all or most’ of the persons employed by the body concerned and only selected employees may, in fact, benefit. In contrast, in an EOT, essentially, every employee of the relevant company or group must be an eligible em-

ployee, except for certain excluded participators. A same terms requirement permits differing amounts to be paid to eligible employees, but every such employee must receive something if there is a distribution. The UK Government considered a change in English trust law to allow employee trusts to last forever instead of limiting their life to 125 years but deferred action on this idea. The EOT has had a significant positive impact in growing the UK employee ownership sector with the number of EOTs exceeding 1030 by the end of 2022.[444] Since 2014 the number of employee-owned companies in the UK has increased rapidly from under 200 in 2014 to in excess of 1,600 (by Autumn 2023), almost all of which are EOT controlled.[445]

The key difference between the US ESOP and the EOT is there are no allocations of shares by the trustee to individual employees. This simplifies the employee ownership model considerably, meaning annual operating costs are low. In all models, assuming employees are not expected to provide finance, the only source of finance to support employee ownership is company profits. Bank loans can be used to accelerate payments and provide working capital, but the loans will need to be repaid with interest from company profits. The US ESOP's recurring repurchase obligations are similarly satisfied from company profits. The trustee of any EOT, assuming it is a controlling shareholder, has scope to ensure company profits are applied as the trustee think is best aligned with an employee ownership ethos. In practice, in the UK this means paying out "surplus" profits as bonuses to all employees on a regular (typically annual) basis. In summary, once an EOT trustee has paid for its shareholding, company profits may be used to finance all-employee cash bonuses.

In business successions[446] the EOT can be an option for the European ESOP when it is not desired that shares eventually end up in the hand of outsiders and when the perpetuity of the employee ownership is the goal. The core mechanism of such an arrangement is the EOT: On the one hand, the trust sells shares to employees and possibly provides them with matching shares under an approved scheme. On the other hand, both employees and external investors are allowed to sell their shares only to the EOT, so that the EOT also serves as the only marketplace for the employer companies' shares. Employees are obliged to sell their shares to the EOT after leaving the company. Due to this mechanism, a pool of shares for the future 100% employee ownership is created within the EOT. However, employees cannot – as e.g., in the US ESOP – benefit from share appreciation beyond their employment. Thus, under this arrangement it is rather company profits during the time of employment that are shared with the current active employees via the EOT. The UK Government introduced a capital gains tax exemption and income tax exemption to promote employee ownership in the UK with in particular the former encouraging its use as a solution to the

[444] https://goeo.uk/blog/how-many-employee-ownership-trusts-are-there-in-the-uk/, accessed Dec. 2023.

[445] These latest figures were provided by Graeme Nuttall in December 2024.

[446] The UK recognises another trust for business succession, the share incentive plan (SIP), build on the US ESOP model. The SIP is an "all-employee" plan requiring a trust deed to create a SIP trust, to hold the shares awarded to participants, a free share agreement (if there is to be an award of free shares) and a partnership share agreement (if there is to be a purchase of partnership shares by employees). In relation to using a SIP as a buy-out vehicle, there is a relief from capital gains tax for a person, other than a company, who sells shares to the SIP trustee and who reinvests the sale proceeds in chargeable assets (as defined) within a specified period; relevant conditions require the SIP trustee to acquire not less than 10% of the total ordinary share capital of the relevant company; for details see the UK country profile.

growing challenge of finding a business succession in SMEs; for more details and in particular the tax treatment, see the UK Country Profile.

b) Employee-buyout mutual ("FCPE de reprise") and employee ownership mutual ("FCPE simplifié") funds

In France, employee share ownership is mostly[447] acquired by means of profit-sharing plans as part of the overall system of EFP composed of the following major plans: "intéressement" profit sharing, "participation" profit sharing and "Plan d'epargne d'enterprise or PEE" enterprise savings plans (for details see the French Country Profile). Within this system, invested employee earnings and matching amounts of the employer company must be – and employee profit shares can be – transferred to mutual funds (Fonds commun de placement d'entreprise or FCPE)[448], usually managed by assets management firms, i.e., branches of banks or insurance companies, which invest the assets on the capital markets in shares or bonds of the employer company or of several different companies. In PEE it is furthermore possible to offer employees an option to subscribe to a capital increase at a subscription price with up to 20% discount of the fair market value using their savings and company matching contributions. If the employer company is not listed, the traditional non-diversified FCPE is obliged to invest one third of assets in marketable shares or bonds. There are however two exceptions: (i) "FCPE simplifié" (employee ownership mutual fund) – a mechanism guarantying the liquidity (e.g., by the enterprise) is installed, or the company buys back ten per cent of its own shares – or (ii) since 2006 the "FCPE de reprise" (employee buyout mutual fund) – all assets belong to employees planning to participate in a leveraged buyout. All plans must be broad-based (i.e., apply to all employees, with the exception of those with less than three months of service). A blocking period of five years (profit sharing, PEE) is compulsory and linked to substantial tax incentives, which generally include exemption from personal income tax and social security contributions and imposition of special social contributions of eight per cent for both employees and the employer company and on returns of 13.5% (instead of 32.5% without incentives).

The "FCPE de reprise" was introduced into the French system of EFP to allow employees to take over their employer company under preferential conditions allowing the fund to invest in unlisted shares of the employer company (Art. L.3332-16 Labour Code) or of a company of the same group (or of a holding company set up in view of its acquisition reserved to the employees. The "FCPE de reprise" can be invested up to 95% in shares of the purchased company vs. 67% in the case of the regular non-diversified FCPE[449]; thus, the liquidity reserve is limited to five per cent. The blocking period of sums allocated to the fund continues until the completion of the takeover of the company but no less than five years (as opposed to five years for the classic FCPE). A holding company is created to carry the debt needed to buy out the compa-

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[447] However, it is possible to transfer free shares to employees; since 2006 such transfers are without a holding period and with a vesting period of four years. In privatisation, ten% of shares are reserved for employees and can be offered at a discount of up to 20% of fair market value.

[448] FCPE are a specific type of Undertakings for Collective Investments in Transferable Securities (UCITS) at enterprise level reserved to its employees; at the EU level UCITS are regulated by Directive 2001/107/EC and 2001/108/EC.

[449] FCPEs are usually at enterprise level whereas special rules apply to SMEs; they may be either diversified or non-diversified and while the company must offer the former the latter is optional.

ny; this is usually a S.A.S.[450], i.e., a "simplified joint-stock company" non-quoted and common in LBO transactions (similar to the British limited company and the US limited liability company). Prerequisite is the existence of a negotiated company savings plan (as opposed to a PEE unilaterally implemented by the employer) anticipating the "FCPE de reprise". At least 15 employees (or one third of employees in firms with less than 50 employees) must hold shares in the acquisition vehicle (holding) created. These employees may own unequal shares of the capital, and it is not required that the operation be offered to all employees.

The "FCPE de reprise" system contains some legal constraints and uncertainties that could explain why according to a statement by the Autorité des marchés financiers (AMF) until 2018 the only case registered was „La Redoute".[451] To promote the application of mutual funds in business successions, it is easier to structure the financing of the buyouts, especially those that are management-led, by using the "FCPE simplifieé". In comparison to the "FCPE de reprise", this modification of the non-diversified classic FCPE has no limit on holding unquoted employer securities, provided that a mechanism guarantying the liquidity is in place, or the company buys back ten per cent of its own shares. The only additional requirements are that the FCPE obtain a liquidation valuation at least once a year and that the FCPE give employees a two-month notice before publication in order to make subscription or sale orders. As the following example illustrates investors and financiers still may find management buyouts where employees have an insignificant role more attractive.

c) Cooperatives as intermediary entity for the ESOP model

The Slovenian ESOP, which builds on the US ESOP, UK EOT, and Mondragon cooperative experience, provides a comprehensive blueprint for establishing sustainable broad-based employee ownership. The model focuses on the establishment of a cooperative as a legal entity and ownership vehicle, which holds a specified percentage of shares in the operating company – the ESOP cooperative. The Slovenian ESOP is a fully leveraged employee buyout mechanism, where the operating company finances the purchase of shares in the name of employees.[452] The ESOP cooperative becomes a shareholder in the operating company by purchasing a designated percentage of shares from the existing owners or the operating company itself (treasury shares and issuing new shares). The purchase of shares is financed solely through company contributions called ESOP contributions, minimising the financial burden. Membership in the ESOP cooperative is exclusively open to employees within the corporate group, all employees, upon meeting certain tenure requirements, it automatically terminates when an individual ceases to be employed, including in case of death. Membership in the cooperative and membership shares are non-transferable. The process of entering and exiting the ESOP cooperative is designed to incur minimal transaction costs.

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[450] Art. L227-1 to L227-19 of the French Commercial Code, which was rendered more flexible by Law of 15 May 2001 and most recently was reformed in 2009.

[451] Boucquet, V. La Redoute: le choix d'un FCPE «de reprise» inédit. Les échos, Sept 18. login 29. 7. 2023. (https://business.lesechos.fr/directions-financieres/financement-etoperations/credits/030546601858-la-redoute-le-choix-d-un-fcpe-de-reprise-inedit-313266.php)

[452] The upcoming Slovenian ESOP legislation anticipates a tax-clawback to disincentivize sell-outs. If the members (democratically) decide to sell the EC stock or dilute EC ownership, they must return a proportional part of the tax breaks on corporate income tax received in past 10 years in acquiring the stock by the EC.

The cooperative as vehicle allows simple and low-cost membership administration, with all members having individual capital accounts (ICA) that capture the appreciation of their shares.[453] This appreciation may vary among members. Alternatively, individual capital accounts can represent a debt owed to members upon exit, similar to the Mondragon model. Once the acquisition debt is paid back, the ESOP contributions remain in place with the board of the target company (operating company) deciding annually on profit allocation and the size of the contributions based on financial capacities of the operating company. ESOP contributions are used to *maintain* employee ownership by buying off the oldest shares on ICAs and re-allocating the shares to all the active accounts. New members gradually accumulate value/shares on their ICAs, while departing workers are gradually paid out without incurring heavy liquidity constraints upon their exit. The repurchase period, in principle indefinite, is established according to the ESOP's financial capabilities. The distribution of profits to members in varying amounts follows a distribution key that measures the individuated claim over the retained and distributed profits determined based on pay ratios within the operating firm. The ESOP cooperative members direct the decisions of their representative on ESOP-related matters, with each member having one vote. Their representative enacts these decisions at the shareholder level of the operating company with the vote proportional to the stock held by the cooperative.

d) Strategic shareholding via Employee Ownership Foundations

On 1 January 2018, the Austrian Employee Ownership Foundation Act (BGBl. I Nr. 105/2017), entered into force to flexibilise the framework for private foundations and at expand their scope by introducing a new form of private foundation with commercial purpose[454] – the Employee Ownership Foundation (EOF). One of the aims of this regulation was to make hostile takeovers more difficult, render Austria more attractive for businesses and secure jobs. The law reconfigures the rules for private foundations with commercial purpose as a whole.[455] For all or defined groups of employees, as of 1 January 2018, the free or discounted distribution of shares of the employer company up to a value of EUR 4,500 per year are exempt from tax and social security contributions conditional that the shares are managed under a fiduciary arrangement by the employee ownership foundation and that these remain in the foundation until the end of employment.[456] Furthermore, administrative costs covered by the employee ownership foundation are not considered taxable benefit of the employees. Finally, the transfer of the right to dispose of employee shares to an employee after the termination of employment by the employee ownership foundation is tax neutral within the

[453] In addition to ICAs, (partial) collective capital accounts are allowed in Slovenian ESOP to further decrease the risk of liquidity problems in financing the repurchase liability; only a portion of the retained profits are individuated to the workers, and a portion is collectivized similar to Mondragon cooperatives' structure.

[454] "Betriebliche Privatstiftung" is a concept in Austrian tax law meaning a private foundation, where the trustor's capital contribution comes from business assets and constitutes an operating expense.

[455] Report of the Finance Committee of the Austrian National Council on the 2017 Law on Employee Ownership Foundations https://www.parlament.gv.at/PAKT/VHG/XXV/I/I_01722/fname_642954.pdf; accessed 3 January 2018.

[456] Hitherto, shares were exempt from tax and social security contributions up to a value of EUR 3,000 (having been increased in 2016 from EUR 1,640), if allocated directly to employees, not to a foundation. Existing employee participation schemes using an intermediate company, such as voestalpine Mitarbeiterbeteiligung Privatstiftung at voestalpine AG, had to bring about tax-neutral solutions through appropriate contractual arrangements.

above-mentioned annual limit. The EOF serves the collective warehousing and administration of employee shares of the companies concerned, not just the mere transfer of dividend income as in the case of the already established model of the employee participation foundation. In addition to the newly redesigned benefits for employees granting shares to employees bundled in an employee ownership foundation for the duration of their employment facilitates the formation and/or strengthening of a core shareholder with a uniform exercise of voting right. The allocation of shares and other assets by the company to the employee ownership foundation is exempt from the 2.5% capital transfer tax applied to assets transferred into a private foundation and corporate tax; the shares granted are deductible as operating expenses. The sole criticism of the new legislation is that its scope is limited to joint stock companies which, experts argue, might violate the constitutional principle of equality regarding limited liability companies.

The EOF – apart from the administration of the employees' shares – is entitled to hold shares of the employer company with a ceiling of 10%% of the voting rights in that company. Such shares, being initially held by the EOF under a fiduciary arrangement, must be successively transferred to the employees. To enable the employer company to financially facilitate the acquisition of shares by the employees ("financial assistance") in this context § 66a sentence 2 of the Austrian Public Limited Company Act now explicitly allows the employer company to advance funds, provide collateral or give loans with a view to the acquisition of shares "by or for" employees of the company or an affiliated company. The Austrian provision, which is based on the implementation of the 2nd Directive on Company Law, goes much further than the German equivalent provision, which covers only the share purchase "by" the employees themselves.

e) Business succession in micro-enterprises via Sociedades Laborales

A Sociedad Laboral (SL, worker-owned company) is a qualified form of conventional corporations, majority-owned by its permanent employees. Unlike a cooperative, an SL is based on shared ownership and is permitted to utilise non-employee capital. This makes it an ideal tool for business succession in partnership or micro-enterprises where the retiring owner(s) can gradually cash out and – for a transition period – remain shareholders in the SL while handing over the management to the new employee owners. Permanent workers must own more than 50 % of company shares while the minimum number of working partners is two and individual shareholders may not hold more than one-third of the capital (except in SLs partially owned by the State, Autonomous Communities or Local Authorities, in which case public ownership may reach up to 50%). In general, non-owner workers may not work more than 49 % of the hours worked by worker-owners. When a worker-owner leaves the company, his or her shares must be offered for sale internally, with non-shareholding employees having priority. There are two forms: *Sociedad Anónima Laboral* (SAL) with minimum equity capital of Euro 60,000 and *Sociedad Limitada Laboral* (SLL) with minimum equity capital of Euro 3,000. Like any other corporation each SL must establish a compulsory reserve for the compensation of losses of 10% of its annual net profits until it reaches 20% of the share capital; furthermore SLs are obliged to form a Special Reserve Fund amounting to another 10% of its net profits until the funding reaches 200% of social capital (other than to compensate losses these funds can be used to support the purchase of shares by non-owner workers). The remaining profits can be distributed be-

tween the members of the workers' company, attributed to a voluntary reserve to increase the company's own capital or used for any other legitimate corporate purpose.

Important for buying out retiring owners is that in Spain an SL may apply for an exemption from taxes and notarial deeds on asset transfers to the SL incurred in the start-up phase. Furthermore, workers' companies are exempted from: (1) notarial deeds on transfers to the company as well as notarial deeds on bond debts, and debenture bonds (including a 99% tax reduction when the worker-owned society acquires goods or rights from the company where the majority of its workers were previously employed); (2) taxes in connection with company formation and transformation of SLL to SAL or vice versa as well as capital increases (additional to a tax credit of 99% of taxes connected with transfer of shares to employees). Furthermore, pursuant to Art. 11.2. a) Corporate Tax Law tangible fixed assets, intangible assets and property investments affected by SLs in conducting their activities and acquired during the first five years from the date of qualification, may be depreciated freely. Finally, investments in fixed assets and the reimbursement of loan interests are supported by aids and subsidies.[457]

Another important element facilitating employee buy via SLs is that government grants facilitate the integration of unemployed persons as worker-owners as well as technical assistance and training. Unemployed persons can capitalise their unemployment benefits as a lump sum to start a new SL or to recapitalise an existing SL by joining it. Since September 2023, the requirement of prior unemployment was dropped, making it now possible for any employee to capitalise their unemployment benefits to set up a new or buy into an existing SL. However, there is a significant difference to conventional start-up subsidies for the unemployed in that SLs are set up not only by unemployed persons but also by ordinary entrepreneurs and typically involve external investors which account for 27% of their partners. Unlike conventional start-up subsidies for jobseekers, SLs offer not only access to capital but practical assistance and entrepreneurial advice to an unemployed person joining or setting up an SL. With respect to secondary employment, SLs have two structural features that differentiate them from ALMP start-ups: (1) they involve outside investments, a condition for growth; (2) they require a minimum of three partners as a condition of incorporation and are designed to integrate additional employees. According to employment data for 2008 – 2013, 1.3 additional jobs were created per founding worker partner.[458] In the Basque Country from 2006 to 2013, an average of 49 SLs were created annually, providing jobs for 164 owner-workers and 213 non-owner-workers. With annually on average subsidies of EUR 355,917 for 377 jobs this breaks down into a subsidy of EUR 944 per job created.

5. Commonalities amongst Member States and required national rules

As EFP is most often only regulated sporadically – if at all – most of the Member States do not govern general principles on the matter. However, where such principles

[457] Independently general fiscal incentives for SMEs and newly founded businesses introduced in 2013 also apply to the SL.

[458] The EEPO review (EC 2014) analysed a large variety of start-up subsidies to reactivate the unemployed existing in all EU Member States found an average rate of secondary employment of merely 0.2. Following the EEPO criteria Lowitzsch, Dunsch and Hashi (2017) found that in comparison SLs were superior in all indicators under consideration (all following figures from the Basque Country stem from this study).

are regulated, they reveal a number of similarities that are shared among the EU with regard to the basics of EFP. Only on a few issues and only in a few Member States do specific prerequisites or conditions exist. The purpose of this Section is to give an overview of both the commonalities and – where they exist – the prerequisites, starting with (the few) existing general rules, then discussing issues typically to be explored when setting up one of the European ESOP variants pertaining to share-based profit sharing, and fiduciary relations; the Section closes with an overview of rules and principles for intermediary entities.

a) General principles for share schemes

Range of application: There are no regulations on the range of application of EFP schemes in any Member State, with only one exception. In the Netherlands, individual share-ownership plans are reserved for listed companies. Non-listed firms that wish to introduce employee share-ownership are required to set up an intermediary entity that acquires and administers the shares. The lack of regulation on the issue means that all EFP plans are generally open to all company types in all but one EU Member States.

Eligibility: All Member States that have regulations on the issue of eligibility require EFP plans to be generally broad-based, i.e., open to all or at least to a majority of workers in the employer company (or an affiliated one) if they wish to benefit from incentives ("qualified plans"). Exceptions to the rule are allowed with regard to employees that have just entered the firm. For example, this applies to workers with less than three months in a company (France), less than one year (Belgium, Germany), depending on the type of award 18 months (United Kingdom), or even three years (Ireland). Some of these schemes are also accessible for retired workers or even for employees' family members.

Method of admission: In general, EFP schemes are voluntary for both workers and enterprises in all Member States. There are only two exceptions. In France, all companies with more than 50 employees are obliged to introduce broad-based profit-sharing. In Belgium, collective agreements may defect from the principle of voluntariness and introduce obligatory EFP schemes.

Principle of distribution: Most countries do not regulate the principle of what a company decides to distribute under EFP schemes. EFP may be based on profits, on a firm's turnover, EBIT or cash flow, or individual or group performance.

Connection to the system of remuneration: There are different legal rules on the relation of EFP to the system of remuneration in the MS. In Malta, profit-sharing is often explicitly considered as part of a worker's wage remuneration, while in Portugal, it is excluded from the system of remuneration. As EFP schemes are voluntary in almost all countries, it is clear that they are on top of regular wages. However, if shares or stock options are distributed at discount and not for free, participating employees need to invest parts of their savings or wage income in the plan. Often these worker contributions are limited.

Communication of the implementation of a scheme: With regard to communication and information requirements on EFP schemes, regular density varies as well. Few countries (e.g., Austria, Belgium, Germany, Greece and France) have specific rules on how the implementation of such plans must be communicated to employees. Such obligatory communication has to include information on the eligibility, the conditions of participation, the mechanism of distribution (including blocking and vesting periods) or

the amounts payable to each worker or the prices for shares and stock options. Further, in Belgium, such communication statements have to include information on the relationship of the respective scheme to the company's employment development policies. In the UK, SIP participants must receive an official notice explaining how buying shares might affect State benefit entitlements.

b) Regulatory scope of possibly required national rules to be settled for ESOPs

General rules for share-based schemes – *Origin of shares:* Should companies be allowed to issue new shares or buy back their own shares in order to distribute them among workers? Or should employee shares be limited to shares already issued by the firm? Most of the existing rules go back to the transposition of the optional rules contained in the 2nd Council directive on Company law from 1976.[459] ***Evaluation of shares:*** How should employee shares be evaluated if they are not traded on the market? Existing rules typically stem from tax and accountancy laws. ***Mechanism of distribution:*** Should the distributed number of shares be equal for all employees or should it be dependent on specific characteristics, e.g., wage levels or a worker's position in the company? Should there exist an entitlement for workers to receive shares of the company regularly under such a scheme, or should this be subject to a single-case decision by the firm's management? Existing rules in this area often intersect with labour law and, therefore, may be compulsory. Share-ownership schemes employing an intermediary entity are either based on cash- or share-based profit sharing or on workers' acquisition of free or discounted shares. In the latter case, some countries allow for employer matching contributions. With regard to the distribution of funds, two different models exist. In the first model, the intermediary entity acquires and administers the shares until they are entirely paid for, subsequently transferring them to the individual employees (Ireland, France, Hungary, Romania). In this case, the intermediary entity is simply the transition to eventually setting up an individual share-ownership scheme. In the second model, the intermediary entity does not only acquire and administer the shares, but may own them, too. In the latter cases (often foundation models or EOTs), employees only command depository receipts of the share (i.e., a claim on the shares' value and returns) or receive cash bonuses based on the shares' return (Austria, Netherlands, Finland, United Kingdom).

Share acquisition – *Mechanism of acquisition*: Should the intermediary entity receive shares for free from the company or should it acquire them at a discount or even at market price? Should the company issue new shares or only contribute shares that are already existing? Should the company be allowed to buy back shares on the market in order to contribute them to the trust? Should the fiduciary entity be allowed to buy shares from outside investors? Should the fiduciary entity be allowed to sell excess shares to outside investors? In general, the intermediary entity acquires shares either directly from the company, in the course of a capital increase or on the market. Shares bought from the company may be acquired under preferential conditions, i.e., at discount or in instalments. If the intermediary entity is set up merely to facilitate share acquisition and distribution of individual employee shares, it is dissolved after the shares are fully paid and transferred (this was the rule until 2015 for the Hungari-

[459] Now Directive (EU) 2017/1132 of 14 June 2017 relating to certain aspects of company law (replacing 2012/30/EU recasting the 2nd Council Directive on Company Law 77/91/EEC of 13 December 1976).

an ESOP). In France, if a company is not listed, the intermediary entity has to invest a minimum of one-third of its funds in marketable shares or bonds. Exceptions exist if the employer company can guarantee the trust's liquidity or if the trust is set up as a vehicle for an employee buy-out. In Finland, such diversification is possible, but not compulsory. ***Financing the Intermediary entity:*** How should the intermediary entity be financed? By a bank or company loan, by regular cash contributions or free contributions of shares by the company? If an ESOP is leveraged, how should the loan be repaid? Directly by the company, via cash contributions from the company to the trust, by income received from the sale of shares to a share-based profit-sharing scheme or by dividends from the shares held? Should the company be obliged to guarantee the loan, or should the fund's assets constitute a sufficient guaranty? Should a leveraged ESOP be subject to a minimum equity ratio? What happens in the case of bankruptcy or if the trust becomes illiquid? As in the case of individual schemes, collective employee share-ownership plans may be financed from a variety of funds, e.g., profits, reserves, equity, or employee contributions. In addition, entities holding shares on behalf of employees may also be leveraged, i.e., borrow funds to acquire shares. Where Member States have made use of the option, in accordance with Art. 23 (2) of the 2nd Council Directive, companies may advance funds or make loans to the trust or to guarantee a bank loan taken by the trust for buying employee shares. The trust (or the guaranteeing company) is fully liable for its debt, while the liability of the trust participants (the employees) is restricted to the value of their funds.

Rules for employees – *Employee Contributions*: Should employees be allowed to contribute to the acquisition by deferring compensation or making own additional contributions? If yes, should there be a ceiling to contributions? Should matching contributions by the employer be possible? If employee contributions are allowed, should the fiduciary entity be obliged to diversify or to take out an insurance policy to guaranty the contributed cash? Only two countries have specific rules on financial contributions by workers to share-ownership held in intermediary entities. In Ireland, an employee may deduct 7.5% of pre-tax salary to increase her share from an underlying share-based profit-sharing scheme. In France, workers may even invest 25% of their gross earnings in the scheme. In both countries, employer matching contributions are possible and regular practice. ***Holding Period***: How long should the fiduciary entity hold the shares before they become disposable to the individual employee? What should happen with the dividends from the shares during that period? Should there be another blocking period subsequent to this initial holding period? There are no legally required holding or blocking periods in the majority of Member States. Only Austria stipulates a holding period of nine years and Ireland stipulates a range between two and twenty years, depending on the targeted tax-breaks. ***Termination of ownership:*** If an employee wants to sell her shares, should companies or intermediary entities holding employee shares be obliged to buy them back if no market exists for them? Should workers be banned from selling shares to outside investors? Should workers be obliged to sell their shares if they leave the company? Should employee shares be inheritable in case of the owner's death? Again, the available legal vehicles presented in the introduction offer very different scenarios with solutions sometimes at the disposal of the contracting parties (e.g., LLC) and sometimes inherent to the legal vehicle itself (e.g., in the case of the EOT or the ESOT). In most countries there is no legal requirement on how to proceed if an employee leaves the company. In Ireland, employers may require workers to sell their shares to the company on leaving.

In Finland, there are more specific rules on the issue with employees being allowed to withdraw from the trust a maximum of 15% of the value of their funds annually; however, upon retirement, they are entitled to withdraw the entire value of their funds immediately or in instalments within four years.

Intermediary entities - *Control of the trusteed entity*: Who should be in charge of managing the trusteed entity? Should employee-owners have a say on the operations of the trusteed entity? There are only four Member States that have regulations on who should be in charge of an intermediary entity holding shares on behalf of employees. In Austria and Finland, it has to be the employer company. In Romania, the intermediary entity is required to set up a general assembly where each participant has one vote. In France, control of the intermediary entity has to be transferred to an asset management firm. ***Information requirements*:** Should the company or the fiduciary entity be obliged to regularly inform employee-owners about their investment? If yes, what should be included in such a documentation? In most Member States, there are no legal requirements on the communication and information policy of an intermediary entity holding shares on behalf of employees. Only in Romania, the company is obliged to disclose all relevant commercial and financial information as well as to finance a preliminary feasibility study before setting up such a scheme. In Finland, the intermediary entity is required to inform each employee about her account at least once a year by letter. Further, the criteria of investment of profit-sharing funds must be disclosed at least one year in advance.

6. Conclusion – Launching a Common European framework for ESO under the roof of a European ESOP

Thirty years of research has confirmed the positive effects of ESO for European enterprises and its important function for business succession. However, the need for employers to identify the applicable law, to discover the provisions of a foreign applicable law, often involving translation, to obtain the legal advice necessary to understand its requirements, and to adapt their EFP-plans to the different national laws that may apply in cross-border situations, makes implementation of cross-border EFP schemes, and ESO schemes in particular, more complex and costly than operating a plan in one Member State (High-Level Group of Experts 2003). This situation is exacerbated by the fact that ESO in some Member States is not regulated, or if so, only to a very limited extent, thus adding to the uncertainty.

a) Disparities between the national rules of Member States obstruct the fundamental freedoms and distort competition

Contract-law-related barriers are thus a major contributing factor in dissuading a large number of firms with operations in more than one Member State from offering cross-border ESO plans to their employees. In cases where a successful ESO plan is an important part of corporate culture, this could even prevent firms from expanding operations into additional Member States. This deterrent effect is particularly strong for SMEs whose costs of entering foreign markets are particularly high in relation to their turnover. In this event, both employers and employees are deprived of the cost savings that an ESO plan based on one uniform contract law for all cross-border transactions could achieve.

Differences in national laws governing employee share ownership are therefore a major barrier, which prevent both employers and employees from reaping the ad-

vantages of the internal market. Those civil law barriers would be significantly reduced, if ESO schemes could be regulated by the same contract law rules, irrespective of country. By reducing legal complexity, a common European framework would also significantly reduce transaction costs. Uniform contract law rules should apply to the full life cycle of an ESO scheme (and EFP schemes in general) and thus would include provisions most important to contractual agreements on ESO. These should also include provisions to assure trans-national portability for employees.

Differences between national company, tax, and contract laws as they affect implementation of cross-border EFP plans also contribute to limiting competition. EFP, in particular ESO, is a valuable means of attracting and retaining key employees (IAFP 2011 pp. 25, 125, 133). With a low level of cross-border EFP plans, there is less competition for key staff, and thus less incentive for firms to become more innovative and to improve the quality of working conditions. The barriers to cross-border EFP plans may jeopardise competition between SME and larger companies, particularly with regard to attracting and retaining key employees. Because of the significant impact of transaction costs in relation to turnover, an SME is much less likely to extend its EFP plan to a foreign market than a larger competitor.

b) EU legislative proposal for a Common European Employee Stock Ownership Plan

To overcome above-described barriers, one of the options endorsed by the 2014 European Commission Study[460] and part of the “Five-Point Plan to Promote Employee Participation” of the DG MARKT Pilot Project is a new legislative initiative, the “Common European Regime in EFP”, which would aim to create a level playing field for EFP across the EU-28. This proposal responds to the call for a legal European optional framework for EFP[461] referring to the suggestions of the EP resolution on EFP of 14 January 2014[462] and further developing the approach[463] therein postulated. As the name suggests, this would be a second contract law regime parallel to national legislation on ESO.[464] It would offer employers and employees a choice between two alternative EFP regimes one originating in national legislation, the other in European legislation. The choice between these two alternatives would be entirely optional. The common European regime would neither replace nor override national legislation but would serve as a cross border alternative to national laws, to be used at the discretion of the parties involved. In its resolution on EFP of 14 January 2014[465] the EP – referring to the Pilot Project and its interim report – also called for an impact assessment and

[460] See Chapter IX “EU legislative proposal for a Common European Regime on Employee Financial Participation”, pp. 89 ff. of the Commission Study “The Promotion of Employee Ownership and Participation”.

[461] For references of this aim in the current and past policy development see above Chapter I d) “EFP on the EU policy agenda”, Chapter II 2. a) “Current challenges of EFP - Differences between national legal frameworks on EFP” and Chapter V 2. “Follow-up and consultations on conference results”.

[462] Resolution on EFP in Companies’ Proceeds P7_TA(2014)0013, recitals 7, 16.

[463] The EP approach roots in the concept of a so-called “29th Regime” as mentioned in the 2010 EESC Own-initiative Opinion INT/499 and the EP Resolution T7-0013/2014.

[464] Similar to the Commission proposal for a Common European Sales Law to which this potential proposal refers in the following; COM(2011) 635 final. 2011.

[465] Resolution on EFP in Companies’ Proceeds P7_TA(2014)0013, recitals 17, 20, 21.

> *"Encourages the Commission to present an independent impact assessment on such a '29th regime' for EFP, anticipates the inclusion of information thereon in the Commission's interim report"* (P7_TA(2014)0013, recital 20).

The 2018 Own-Initiative Report on the "role of Employee Financial Participation in creating jobs and reactivating the unemployed" of the European Parliament[466] took up these postulates with a focus on SMEs and stressing the importance of ESOPs:

> *"1. Calls on the Commission to consider appropriate recommendations to encourage Member States and companies, particularly SMEs, to develop and offer EFP schemes for the benefit and in the interest of both employees and companies; … 3. Calls on the Commission to implement the 'five-point action plan' included in the final report of the pilot project for the promotion of employee ownership and participation of 2014;"*

Against this background a "Common European ESOP Regime", could be launched as a first step towards a "Common European Regime on EFP", which would complement existing national laws aiming primarily at their harmonisation.

c) Elimination of obstacles resulting from the multifarious development of national laws

A "Common European ESOP Regime", as a first step towards a "Common European Regime on EFP" would complement existing national laws aiming primarily at their harmonisation. Its objective is to eliminate obstacles to the single market that mainly, though not exclusively, stem from heterogeneous regulatory density. The existing condition is due to the multifarious development of national laws governing EFP in the Member States: These schemes – and their resultant legislation – have only recently been introduced in some countries, while in others they have a long tradition. Depending on national tradition, corporate culture and social partners' attitudes, they vary greatly in both form and extent across the EU-28 (see the overview of EFP in EU-28 in Chapter II). In fact, unlike for example in the case of the European Company Statute or the Common European Sales Law the average density of existing national regulation on EFP across the EU is entirely different, i.e., very low. While some countries, e.g., France and the UK, recognise all main types of EFP schemes that could be contained in a "Common European ESOP Regime" (i.e., share-based profit sharing, employee shares, stock options and Employee Stock Ownership Plans) the majority of Member States regulates only one or two types. Furthermore, in many countries these rules are only rudimentary, e.g., Portugal, Estonia, Bulgaria, Cyprus; for a mapping of the diversity of regulatory density across the EU-27 see Chapter VII, Table 14.

Such the "Common European ESOP Regime" would be above all an optional solution to match national law where rules do not or not sufficiently exist. While in some Member States the common European regime would introduce coherent rules for the first time, in the majority of countries, it would overlap only the area of existing national regulation dealing with a specific EFP scheme. Only in a minority of Member States would it actually duplicate national law. Similar as in the case of the Common European Sales Law the "Common European ESOP Regime" concerns a legal area where wide national differences (with regard to company, tax and contract law) exist. But regulation of EFP

[466] European Parliament Own-Initiative report adopted on 23 October 2018, (2018/2053(INI)).

is further complicated by differences and discrepancies stemming from heterogeneous regulatory density and scope of application leading to contradictions and legal uncertainties across borders, and thus obstacles to cross border plans. It is in cases where no or very limited national legal rules exist that the approximation effect is strongest. As the "Common European ESOP Regime" would provide an optional EU-wide default solution for countries where regulatory density is low, it would give governments a clear incentive to harmonise national legislation with EU-wide best practice and that of advanced countries. Thus, the "Common European ESOP Regime" would induce governments to amend national law in line with the newly introduced EU-wide rules.

Regarding its contents the "Common European ESOP Regime" would contain best practice rules derived from each of the ESOP vehicles discussed in this Chapter to reflect the entire life cycle of SMEs (starting up, consolidation, succession). In this way an adaptable regulatory framework can be developed that not only respects different legal and cultural traditions but also provides flexibility to the key functions of the EU-ESOP as summarised in Table 15.