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TAXATION

Saving the EU-ESO: Enhanced Cooperation as EU Inc.'s Way Out?

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The EU Inc. proposal of 18 March 2026 (COM(2026) 321 final) promised founders a single, harmonised corporate form covering aspects of corporate, insolvency, labour and tax law. Its most relevant feature for start-ups is the EU Employee Stock Option scheme (EU-ESO). Stock options let start-ups pay employees partly in equity. Many Member States, however, tax the benefit when the options vest or are exercised, before the employee can sell the shares. The EU-ESO removes that 'dry' tax charge. An EU Inc. may grant its employees and board members warrants (rights to subscribe for new shares), and taxation is deferred until the employee disposes of the shares (Article 79(2) of the proposal). Member States must also treat EU-ESO warrants no less favourably than other employee stock options under national law.

That feature has become controversial. At the Council working party of 10 September 2026, around 19 Member Statesreportedly raised concerns about the tax provisions, questioning whether tax measures belong in legislation that does not require unanimity under Articles 113 or 115 TFEU. France and Germany, reportedly joined by Italy, Spain and the Netherlands, supported them. Pascal Canfin, Renew Europe's shadow rapporteur in the European Parliament's Legal Affairs Committee (JURI), reportedly attributed the opposition to the scheme's fiscal implications rather than to technical concerns. At the Competitiveness Council of 24 September 2026, Executive Vice-President Stéphane Séjourné warned ministers that the regime would lose much of its usefulness without the EU-ESO. The co-legislators hope to agree the final text by the end of 2026.

In May, Thomas Jaeger and Adnan Tokić argued on this blog that Article 114 TFEU is the wrong legal basis for the regime and that its tax provisions belong under Article 115 TFEU. This post takes the second limb of that diagnosis as its starting point and asks how the EU-ESO tax rule

can be saved if it cannot stay where it is. I argue that the most realistic route is to decouple the tax rule from the Regulation and pursue it through enhanced cooperation. That route is legally available, but it carries costs that the Council should weigh openly.

Why the Tax Rule Cannot Stay in the Regulation

Article 114(2) TFEU excludes 'fiscal provisions' from the scope of Article 114(1) TFEU, and the Court of Justice reads that exclusion broadly. In Case C-338/01 Commission v Council, it held that, by reason of their general character, those words cover all areas of taxation, without distinction between types of taxes, and all aspects of taxation, whether material or procedural (para 63). The Court confirmed that reading in Case C-533/03 Commission v Council (para 47). A rule fixing the moment at which employment income from stock options is taxed falls squarely within that definition.

The Commission might reply that the rule is merely complementary to a company law instrument. The Court, however, held in Case C-338/01 Commission v Council that the legal basis turns on the aim and content of a measure (para 54), and in Case C-533/03 Commission v Council that the decisive question is whether its sole or main purpose is the approximation of national rules in tax matters (para 48). That argument is difficult to sustain. The Commission itself presents the EU-ESO as a central attraction of EU Inc., as the Executive Vice-President for Prosperity and Industrial Strategy, Séjourné, told ministers that he could not see the 28th regime working without it. The tax rule is therefore not incidental to the scheme. Nor can Article 115 TFEU be added as a second legal basis. In Case C-300/89 Commission v Council, the Court excluded a dual basis where the procedures are incompatible (paras 17–21), as qualified majority voting and unanimity are.

The Council's drafting does not cure the defect. Its unpublished second compromise text (Council document 12824/26), examined on 10 September 2026, reportedly adds language stating that the Regulation does not touch tax law, which remains national, and that 'the harmonised EU-ESO also does not affect any existing national employee stock option schemes, including any taxation benefits or other incentives they may have'. The same text keeps the EU-ESO tax provisions in place. A statement that the Regulation leaves tax law untouched cannot alter its content, and on the Court's aim-and-content test that content still includes a rule on when stock options are taxed. The rule must therefore leave the Regulation.

Keeping the rule in the Regulation may therefore open the door to annulment actions under Article 263 TFEU. Since any Member State may bring an annulment action whatever its vote, the size of the opposing bloc bears on the likelihood of an action; with up to 19 dissenting delegations, an action is likely, and for the reasons above it would have good prospects. Even a partial annulment would damage confidence in the whole regime at the moment of its launch.

The Obvious Alternatives Do Not Work

The first alternative is a separate directive under Article 115 TFEU. That would cure the legal basis problem, but it requires unanimity, which a majority of Member States opposing the scheme will not provide. The second is to base the entire regime on Article 352 TFEU, as the start-up community originally advocated for. That option also requires unanimity and would expose the non-tax parts of EU Inc. to the same veto. The third is soft law, such as a Commission recommendation encouraging Member States to defer taxation. It would avoid the competence problem but would defeat the point of the scheme, whose value lies in cross-border legal certainty for founders and employees.

The appropriateness of Article 114 TFEU as a legal basis is also contested on grounds beyond the exclusion of fiscal provisions, as in Case in Case C-436/03 Parliament v Council the Court held that a regulation creating a new European legal form alongside national forms, which it left unchanged, did not approximate national laws and belonged under Article 308 of the Treaty establishing the European Community (EC), now Article 352 TFEU, not Article 95 EC, now Article 114 TFEU (paras 44–46). Jaeger and Tokić argue that EU Inc. falls within that reasoning, because it is a self-standing European form that sits alongside national company forms rather than approximating them, like every earlier EU company form, all of which rest on Article 352 TFEU or its predecessor. The Commission's reply, that EU Inc. is a harmonised form 'introduced in the national legal orders of all Member States' (recital 4), describes where the form will be available rather than what the measure does, and it is the aim and content of a measure that determine its legal basis. The better view is therefore that Article 352 TFEU, not Article 114 TFEU, is the correct legal basis for EU Inc. That provision could, in principle, also carry the tax rule, since it contains no exclusion of fiscal provisions comparable to Article 114(2) TFEU. But it requires unanimity, so the hurdle facing the tax rule would not disappear but would extend to the entire regime. Either way, the tax rule should leave the Regulation. If

the Council keeps Article 114 TFEU for the rest, decoupling lets it proceed by qualified majority. If it turns to Article 352 TFEU, the regime needs unanimity in any event, and detaching the provision that most Member States oppose gives the rest its best chance of obtaining it.

A fourth option, an intergovernmental agreement among willing Member States on the model of the Unified Patent Court Agreement or the Fiscal Compact, would avoid unanimity at a high price, namely national ratification (a decade for the Unified Patent Court Agreement), no primacy of Union law, and Court of Justice jurisdiction only as far as the parties confer it. Enhanced cooperation keeps the measure inside the Union legal order, under Commission initiative and Court of Justice review, and open to every Member State under Article 328 TFEU.

Enhanced Cooperation as the Way Out

Enhanced cooperation, governed by Article 20 TEU and Articles 326–334 TFEU, allows at least nine Member States to adopt measures among themselves in areas of non-exclusive competence. The Council grants authorisation on a proposal from the Commission, after obtaining the consent of the European Parliament (Article 329(1) TFEU). Only the participants then vote on the substantive measure under the ordinary legal basis, and where that basis requires unanimity, it means their unanimity alone (Article 330 TFEU), as the Court confirmed in Joined Cases C-274/11 and C-295/11 Spain and Italy v Council (para 35). Hence, the willing Member States could adopt an EU-ESO tax directive under Article 115 TFEU without the agreement of the others.

No Article 115 TFEU proposal exists yet, so the Commission would have to table one, largely replicating Article 79. The Parliament must consent to the authorisation, but it is only consulted on the directive itself. Because Article 115 TFEU allows only directives, the deferral rule would also depend on national transposition, which bears on the uniformity problem discussed below.

In Spain and Italy v Council, which concerned the enhanced cooperation on the unitary patent, the Court dismissed the challenges against the authorising decision. It confirmed that nothing prevents enhanced cooperation where the Treaties require unanimity, and that the impossibility of acting as a Union may stem from the inability of interested Member States to agree on content (paras 35–36). Enhanced cooperation on a financial transaction tax (FTT) was authorised by Council Decision 2013/52/EU, and in Case C-209/13 United Kingdom v Council

the Court dismissed the challenge because it targeted the future tax rather than the authorisation. The tax, however, has never been adopted. The patent case shows that the route can withstand judicial challenge. The FTT shows that authorisation does not guarantee that the participants will ever adopt the measure.

Five Member States reportedly support the scheme. Backing harmonisation for all 27 does not guarantee joining a smaller group, but these five might be expected to join, leaving four more to meet the threshold. For smaller economies competing for start-up talent, a deferred-taxation rule shared with France, Germany, Italy, Spain and the Netherlands may well be attractive. Italy, which challenged the unitary patent cooperation in 2011 and joined it only in 2015, would now rely on the same mechanism.

The Costs of Decoupling

First, Article 20(2) TEU requires that the Council adopt the decision authorising enhanced cooperation only as a last resort, once it has established that the objectives cannot be attained within a reasonable period by the Union as a whole. In Spain and Italy v Council, the Court treated this condition as ‘particularly important’ and held that only situations in which it is impossible to adopt legislation for the Union as a whole in the foreseeable future qualify (paras 48–50). Its review is, however, limited to whether the Council examined the relevant aspects carefully and impartially and gave adequate reasons (paras 53–54). There, the Court accepted the Council’s reliance on a legislative process begun in 2000 (para 55), even though, as Spain stressed, less than six months separated the Commission’s proposal on the language arrangements from its proposal for enhanced cooperation (para 43).

The last-resort condition presupposes a failed attempt to legislate, and no such attempt has yet been made, because no Article 115 TFEU proposal exists. The disagreement recorded so far in the Council concerns whether tax provisions belong in a regulation adopted under Article 114 TFEU. It says nothing about whether the Member States could agree unanimously on a deferral rule under Article 115 TFEU. A record that satisfies Article 20(2) TEU would require the Commission to table such a proposal and the Council to examine it in good faith before concluding, with reasons, that unanimity is out of reach. The FTT shows how long that sequence can take. The Commission tabled its proposal in September 2011, the Council recorded deadlock in mid-2012, and it authorised enhanced cooperation in January 2013. If the

EU-ESO followed the same sequence, the tax rule would trail the Regulation by a year or more.

Second, the result would be a two-tier EU Inc. The corporate form would be uniform, while the tax deferral would depend on where employees are taxed and on national transposition. Cross-border employees add complexity, since the proposal does not address how taxing rights are allocated when employees move between Member States between grant and disposal. Tax treaties partly fill that gap. The Commentary on Article 15 of the Model Tax Convention of the Organisation for Economic Co-operation and Development allocates taxing rights on employee stock options by reference to where the employee worked between grant and vesting (paras 12–12.15). But Member States do not all apply that guidance, and deferral to disposal sits uneasily with an allocation keyed to vesting.

Third, Article 326 TFEU prohibits enhanced cooperation that distorts competition between Member States, and Article 327 TFEU requires it to respect the competences, rights and obligations of non-participants. Opponents might argue that a tax advantage for employees in participating Member States breaches both. However, in Spain and Italy v Council, the Court rejected a similar argument under Article 326 TFEU, holding that it is inherent in enhanced cooperation that its measures apply only in participating Member States and that this does not in itself damage the internal market (paras 68 and 75). Nor would the directive prejudice non-participants' taxing rights within the meaning of Article 327 TFEU (para 82), since it would govern only when participating Member States tax. The cooperation would also remain open to all Member States under Article 328 TFEU (para 83).

The Wider Picture: Unanimity and Differentiated Integration

The EU-ESO dispute is one instance of a wider problem with unanimity in tax matters. Since its 2019 communication on decision-making in tax policy (COM(2019) 8 final), the Commission has argued that unanimity blocks even modest tax measures that support other Union objectives, and it has proposed a gradual move to qualified majority voting through the passerelle clause in Article 48(7) TEU, which lets the European Council, acting unanimously, move an area from unanimity to qualified majority voting in the Council. That proposal has made no progress, and EU Inc. shows what follows from the stalemate. Unable to move tax matters to qualified majority voting through the passerelle, the Commission has sought the same result through its choice of legal basis, and the Council has resisted.

Enhanced cooperation is a more modest response to the same problem, and it makes no claim to solve it for the Union as a whole. It respects the unanimity rule for tax measures while preventing a minority from blocking Member States that wish to go further. Article 333(1) and (2) TFEU also provide a route out of unanimity within the cooperation itself, since the participants may decide unanimously to act by qualified majority under the ordinary legislative procedure. That mechanism reproduces, among the participants only, the move the Commission proposed for the Union as a whole. Enhanced cooperation in tax is therefore a form of differentiated integration, which secures progress for some Member States at the cost of uniform rules across all of them. The Council must decide whether that cost is acceptable for a regime whose main attraction is uniformity.

Conclusion

The Council faces a choice between keeping the EU-ESO tax rule in the Regulation and risking annulment, or dropping it and leaving EU Inc. without the feature founders value most. A third way is to strip the tax rule from the Regulation and to let the willing Member States pursue EU-ESO taxation through enhanced cooperation. This does not resolve the wider question of legal basis that Parliament v Council raises for EU Inc., but it removes the one provision that Article 114 TFEU cannot carry on any reading and gives the rest of the regime its best chance of adoption, whether by qualified majority or by unanimity. The Presidency already treats the tax provisions as a political question for the Committee of Permanent Representatives. The political answer should be to separate what the Council can agree by majority from what requires unanimity, rather than lose both.

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