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Introduction

I. The new European company law

Company law is undergoing fundamental change in Europe. All European countries have undertaken extensive reform of their company legislation. Domestic company law reform has traditionally been driven by initiatives to remedy weaknesses that have come to light in larger corporate failures or scandals. Initiatives to make corporate governance more effective is one such feature of recent European company law reform. In parallel, company law reform has been taken in the opposite direction by the wish to simplify and lessen the burdens in particular on smaller and medium-sized businesses (SMEs). The new Member States have gone through even more fundamental reform to facilitate a modern market economy and then to implement the *acquis communautaire* in company law. The prospect of regulatory competition increasing the number of domestic businesses incorporating abroad, has increased the pressure to reduce capital requirements.

The case law of the European Court of Justice on the right of establishment and to provide services and the free movement of capital, has in recent years been brought to bear on national company law and corporate practice. National company law has been set aside as restricting the free movement of companies or restricting the exercise of the fundamental freedoms in other ways. As European Union law gradually opens up the choice of country of incorporation for businesses in Europe, the competition between national company laws is increasing.

The harmonisation of European company law through EU legislation (directives and regulations), has also been given a new impetus by the case law of the Court of Justice and different initiatives by the European Commission. This requires transposition in national company legislation. New EU legislation gives further effect to the free movement of companies, which again opens up for regulatory competition.

National company legislation cannot now be applied without regard to the case law of the European Court of Justice on the fundamental freedoms in the EC Treaty on the right of establishment and to provide

services and the free movement of capital. Many provisions of the national legislation require the active use of the directives they transpose. In case of conflict, EU law requires that it is the rule of the directive that is applied. More generally, the EU company law legislation in directives and regulations constitutes a system which is the basic framework for national company law, and often the natural starting point when company law matters are to be resolved. Neither can EU company law legislation in directives and regulations be applied without regard to the fundamental freedoms in the EC Treaty and the case law of the European Court of Justice. EU company legislation itself has to be interpreted and applied so that it complies with the EC Treaty on the right of establishment and to provide services and the free movement of capital. In case of conflict, the Treaty prevails.

Comparative law is not of any less importance in this new context. The application of the fundamental freedoms in the EC Treaty in the review of national company law, can be assisted by analysis of the company laws of other Member States. That is even more so the case for the transposition or subsequent interpretation of EU directives. Concepts and rules often originate in a national system, and even if they may change when they are imported into a directive, knowing about their original meaning may provide assistance. Also the way that directives have been transposed in other Member States, may assist when a directive is to be given effect in the application of national company legislation.

Comparative law is of great importance also when company lawyers are to apply the company laws of other Member States. This is increasingly necessary as a consequence of the Internal Market integration. Contracts with companies of other Member States, investments in their securities and cross-border mergers are just some of the many transactions which require such knowledge.

The company with business in one Member State and incorporation in another, is a further field where comparative company law is required. At the upper end of the market, it is often not enough to have company lawyers of the different jurisdictions working together. There is a growing need for company lawyers with extensive comparative law expertise. At the lower end, where one cannot afford legal advice from experts from different jurisdictions, the company lawyer must just deal with the comparative law issues that occur.

This provides a considerable challenge to scholarship and teaching. This book is intended as one contribution to the emerging discipline of comparative European company law.

II. An outline of this book

The present work examines certain important aspects of the company laws of seven European countries, namely the United Kingdom, France, Germany, Italy, Spain, Belgium, and the Netherlands. Whenever relevant and possible, reference has been made to the situations in these countries. However, the work does not limit itself to the national company laws of these seven countries, but also examines certain bodies subject to a mixed legal regime, such as the European Economic Interest Grouping (EEIG) and the European Company (SE). The emergent discipline of European company law is considered in the following chapter of the present work, in the light of the harmonisation of company law by the European Union and company law reforms in the different national jurisdictions. The relevant harmonising directives and certain draft instruments also receive consideration in Chapter 2. It has also been found necessary to consider harmonising directives in Chapter 8 on employee participation; Chapter 10 on takeovers and mergers deals with the Thirteenth Directive on takeovers;[1] Chapter 11, which is the final one, deals with the Directive on market abuse (insider dealing and market manipulation).[2] As is pointed out in Chapter 2, the harmonising process may have certain defects; it is sometimes very protracted. Directives may become outdated or otherwise in need of reform: both the SLIM Group[3] and the High Level Group of Company Law Experts[4] recognised that the Second Company Law Directive needed certain reforms. One outcome of this was the amendments in a 2006 revision

[1] Directive 2004/25/EC of 21 April 2004 on takeover bids, OJ 2004 L142/12–23. See for the history of the Directive, Commission Communication of 2 October 2002 on the proposal for a Directive of the European Parliament and Council on takeover bids. The chapter also considers the Tenth Directive, Directive 2005/56/EC on cross-border mergers of limited liability companies, OJ 2005 L310/1.

[2] Directive 2003/6/EC on market abuse (including insider dealing and market manipulation), which replaces Directive 592/89 on Insider Dealing.

[3] SLIM stands for Simpler Legislation for the Internal Market, see the 1996 report, COM (96) 204.

[4] As a result of the blockage of the Takeover Directive in the European Parliament, the Commission set up a High Level Group of Company Law Experts under the chairmanship of Jaap Winter to provide advice on key priorities for modernising company law in the European Union. It produced two major reports, see Report of the High Level Group of Company Law Experts on Issues related to Takeover Bids of 10 January 2002, http://ec.europa.eu/internal_market/company/docs/takeoverbids/2002-01-hlg-report_en.pdf; Report of the High Level Group of Company Law Experts of 4 November 2002, http://ec.europa.eu/internal_market/company/docs/modern/report_en.pdf.

directive.[5] The second chapter also deals briefly with the relevance of the comparative law method to the harmonisation of company law both at the European and national level.

Chapter 3 considers the methods of formation of public and private companies in the Member States under consideration. Because of their topicality and relevance it also deals, inter alia, with the important questions of the transfer of the head offices of companies from one Member State to another, and the recognition of foreign companies. Similar problems have been encountered in the jurisprudence of the European Court of Justice in such recent cases as *Centros*,[6] *Überseering*,[7] *Kamer van Koophandel*[8] and *Sevic*.[9]

Chapter 4 is concerned with the various types of business organisation which exist in the relevant Member States. In addition to considering public and private companies, and partnerships, it also deals with hybrid forms of entity such as the French SAS and the various kinds of German GmbH & Co KG, some of which, like the French SAS, are of considerable practical importance. This chapter also briefly considers the private proposal for the introduction of a European Private Company (EPC); the High Level Panel of Company Law Experts recommended a feasibility study to assess the practical need for the introduction of an EPC, and this was followed up in the EU Commission's Communication *Modernising Company Law and Enhancing Corporate Governance in the European Union – A Plan to Move Forward*.[10]

The following two chapters, which are lengthy, deal with matters of cardinal importance to the understanding of company law, namely share

[5] Directive 2006/68/EC of 6 September 2006 amending Council Directive 77/91/EEC as regards the formation of public limited liability companies and the maintenance and alteration of their capital.

[6] Case C-212/97 *Centros Ltd* v. *Erhvervs- og Selskabsstyrelsen* [1999] ECR I-1459.

[7] Case C-208/00 *Überseering BV* v. *Nordic Construction Company Baumanagement GmbH* [2002] ECR I-9919.

[8] Case C-167/01 *Kamer van Koophandel en Fabrieken voor Amsterdam* v. *Inspire Art Ltd* [2003] *ECR* I-10155. This case concerned whether the Netherlands courts could invoke Arts. 1–5 of the law of 1997 governing proforma foreign companies against the Dutch branch of a company incorporated in the United Kingdom, which carried on all or nearly all its business through a branch in the Netherlands. *Alber AG* (following *Centros*) held this to be impossible and the Court agreed generally with his approach.

[9] Case C-411/03 *Sevic Systems AG* v. *Amtsgericht Neuwied* [2005] ECR I-10805; [2006] 1 CMLR 45; [2006] 4 All ER 1072.

[10] *Communication from the Commission to the Council and the European Parliament – Modernising Company Law and Enhancing Corporate Governance in the European Union – A Plan to Move Forward*, COM (2003) 284.

and loan capital, and management and control. The length of these chapters is explained by the number of topics involved, and the diversity of ways in which certain such topics are regulated in the different Member States. Thus, for example, in France and Germany, many different types of company securities exist, and this is discussed in Chapter 5 on share (or equity) capital and loan capital. The German double board system and its optional French counterpart are considered in detail in Chapter 6, which does not however attempt to deal in detail with questions of corporate governance.

In Chapter 7, the legal regimes governing the EEIG and SE are examined in some detail. Attention is also paid to the Statute for a European Cooperative Society.[11] The succeeding chapter deals with employee participation, on which there has been recent legislation in Germany,[12] as well as an important Community directive on a general framework for informing and consulting employees,[13] which has required implementation in the United Kingdom and the other Member States. Chapter 8 deals with employee representation on the supervisory or executive boards of French, German and Dutch companies.

The topic dealt with in Chapter 9 consists of the regulation of groups of companies. This matter has given rise to a number of problems and one may postulate that it is now unlikely that detailed proposals comparable to those enshrined in the abortive draft Ninth Directive on the conduct of groups would now be acceptable to the Member States. The High Level Panel of Company Law Experts did not recommend the enactment of a body of law applicable to groups of companies. However as it suggested some regulation of particular problems relating to groups appears necessary.

This was recognised by the *Forum Europaeum Konzernrecht* which reported on this matter in 1998, as well as by the High Level Panel. Thus the latter body recommended that Member States should be required to provide for a framework rule for groups that allow those concerned with the management of a group company to adopt and implement a coordinated group policy provided that the interests of the group's

[11] OJ 2003 L207. The object of this statute is to provide cooperatives with adequate legal instruments to facilitate their cross-border and transnational activities. The new Statute parallels the SE Statute but has been tailored to the specific characteristics of cooperative societies.

[12] See *Betriebsverfassungsgesetz* 2001 (BGBl 2001, I.2267) and *Drittbeteiligungsgesetz* of 18 May 2004 (BGBl 2004, I.2633–2639) replacing *Betriebsverfassungsgesetz* 1952.

[13] OJ 2002 L80/29.

creditors are protected, and that there is a balance of burdens and advantages over time for the shareholders. This proposal may owe something to French law, but it may be of too general a character to have much influence on the conduct of groups. Although they have certain defects the provision of German *Konzernrecht* have been thought to merit detailed discussion in this chapter. They have had a considerable influence outside Germany, for example in Portugal, Brazil, Slovenia and Croatia.

The penultimate chapter deals with takeovers and mergers. As well as examining the Thirteenth Directive on takeovers, it examines in outline the rules of law of certain of the relevant Member States concerning mandatory bids and defences to takeovers. The impact of the Cross-Border Mergers Directive is considered in this chapter.[14] A more comprehensive examination of the law governing takeovers would exceed the limits of the present work. This chapter also briefly, considers mergers, and the rules of competition law which applies to them.

The work concludes with an account of the Market Abuse Directive (covering insider dealing and market manipulation),[15] which has the effect of repealing the Insider Dealing Directive of 1989, which was implemented in rather different ways in all the Member States. This is the first Directive under which the Commission submitted comitology proposals for secondary legislation under the Lamfalussy procedure. The creation of a satisfactory legal framework for dealing with market manipulation has taken some time and has now moved on to the national level of transposing the EU directive and secondary legislation. Much comparative material is available on the transposition of the Insider Dealing Directive, which has been repealed but where the legislation that implemented it in some countries remains in place (such as with the UK insider dealing legislation). The transposition in Germany has required amendment of the law relating to market manipulation which is contained in the Fourth Financial Market Promotion Act of 2002.

[14] Directive 2005/56/EC of 26 October 2005 on cross-border mergers of limited liability companies OJ 2005 L310/1.
[15] Directive 2003/6/EC on insider dealing and market abuse OJ 2003 L96/16.

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European and comparative company law

I. Harmonisation and free movement

A. Treaty provisions

It is now recognised generally that although there is no question of the total approximation or harmonisation of the company laws of the Member States, a considerable body of European company law has been brought into existence.[1] This has come about mainly through the enactment of directives under Articles 44(2)(g) and 95 EC (former Articles 54(3)(g), 100a EC). The first mentioned Article is set out in Chapter 2, 'Right of establishment of Title II EC, "free movement of persons, services and capital"'. It provides:

> The Council and the Commission shall carry out the duties devolving on them under the preceding provisions,[2] in particular (g) by coordinating to the necessary extent the safeguards which for the protection of the interests of members and others, are required by Member States of companies within the meaning of Article 48(2)[3] with a view to making such safeguards equivalent throughout the community.

[1] See for instance E. Werlauff, *EU Company Law. Common Business Law for 28 States*, 2nd edn (Copenhagen: DJØF Publishing, 2003) who argues in his introduction that 'the company law of these many states is not uniform – nor it is required to be so – but all the main company rules will, or shall, be reflected in the company law of each individual state.' He continues: 'In the "old" days European law accounts of company law necessarily had to be comparative … the emphasis was on the differences in the company law of the states. Now the emphasis will be on the common, cross border features of company law.' He sets out a systematic treatment of EU company law with less emphasis on transposition of directives or national law concepts. See the very important book by S. Grundmann, *Europäisches Gesellschaftsrecht* (Heidelberg: C. F. Müller, 2003) and also V. Edwards, *EC Company Law* (Oxford: Clarendon Press, 1999), whose treatment generally follows the directives in their order of adoption.

[2] These provisions are those of Art. 43 EC, which prohibits restrictions on the setting up of agencies, branches or subsidiaries by nationals of any Member State in the territory of another Member State. This prohibition is applicable to restrictions on the setting up of agencies, branches or subsidiaries by nationals of any Member State in the territory of any Member State.

[3] This provision stipulates that 'companies or firms' means companies or firms constituted under civil or commercial law including cooperative societies and other legal persons governed by private or public law, save for those which are not profit making.

Article 44(2)(g) EC is the basis for nearly all enacted directives in European company law. Despite its position in Chapter 2 of the Treaty, the Community institutions pursue a broad interpretation which is orientated towards the aims of the Treaty.[4] In that view also measures with the purpose of approximating the prevailing conditions of company law can be based on it as long as they have beneficial effect on cross-border transactions.[5] A broad construction of Article 44(2)(g) EC may now be justified, but there must be a link between the legislation adopted under this provision and the fostering of a company's right of establishment.[6] Previously, there was considerable support for an interpretation according to which Article 44(2)(g) EC is restricted to rules which promote the right of establishment.[7] Article 44(2)(g) EC merely gives the competence to issue directives, not regulations.

Article 95(1) EC provides for a different procedure for the adoption of measures for the approximation of the provisions laid down by law, regulation or administrative action in the Member States which have as their object the establishment and functioning of the internal market. Such measures must be adopted by means of the rather long and complex co-decision procedure set out in Article 251 EC, which gives the European parliament the ultimate power of vetoing the relevant draft legislation. In European company law Article 95(1) EC has in practice only been significant as the basis for directives on capital market law.[8] It has been regarded as *lex generalis* in relation to Article 44(2)(g) EC.[9] The Community legislator regularly uses both. Article 44(2)(g) and Article 95(1) EC as legal bases to enact these directives.[10] Article 95(1) EC also

[4] See Case C-97/96, *Daihatsu* [1997] ECR I-6843, 6864.

[5] R. Houin, 'Le régime juridique des sociétés dans la Communauté Economique Européenne' [1965] RTDE 11, 16; see also Edwards, *EC Company Law*, pp. 5–9 and M. Habersack, *Europäisches Gesellschaftsrecht* (Munich: Beck, 1999), para. 20.

[6] See Case C-122/96, *Saldanna and MTS Securities Corporation* v. *Hiross Holdings* [1977] ECR I-5325.

[7] See e.g. Rodière, 'L'harmonisation des legislations européennes dans le cadre de la C.E.E.' [1965] RTDE 336, 342–50; Y. Scholten, 'Company Law in Europe' [1967] 4 CMLR 377, 382; see for the discussion also: P. van Ommeslaghe, 'La première directive du Conseil du 9 mars 1968 en matière de sociétés' [1969] CDE 495, 502–16; P. Sanders, 'Review of Recent Literature on Corporation Law' [1967] 4 CMLR 113, 119 ff; E. Stein, Harmonization of European Company Laws (1971) 174–182.

[8] S. Heinze, *Europäisches Kapitalmarktrecht* (Munich: Beck, 1999), p. 12; E. Wymeersch, 'Company Law in Europe and European Company Law' [2001] 6 *Working Paper Series*, Universiteit Gent 3.

[9] Following the broad interpretation of Art. 44(2)(g) EC.

[10] But other articles have also been invoked, for instance Art. 47(2) EC for the UCITS Directive, the former Art. 54(2) EC for the Directive on Mutual Recognition of Listing Particulars.

entitles the Community legislator to enact regulations.[11] Nevertheless, Community regulations in Company Law have not yet been based upon Article 95(1) EC. Both the Council Regulation 2137/85 on the European Economic Interest Grouping (EEIG)[12] as well as the Council Regulation 2157/2001 on the Statute for a European company (SE)[13] were based on Article 308 EC.[14] Article 308 EC provides that the Council may, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the necessary measures, if action by the Community should prove necessary to attain in the course of the operations of the common market one of the objectives of the Community, and the Treaty has not provided the necessary powers. The European Economic Interest Grouping is a fiscally transparent entity having some of the characteristics of a company and some of an unincorporated body. The European Company is able to operate across borders. It is subject to a rather complex legal regime, consisting partly of rules of European law. The European Company is described more fully in the succeeding chapter.

Article 293 EC is another source for Community measures in European company law. It provides that the Member States shall enter into negotiations with each other with a view to securing for the benefit of their nationals: the mutual recognition of companies or firms within the meaning of the second paragraph of Article 48, the retention of legal personality in the event of transfer of their seat from one country to another, and the possibility of mergers between companies or firms governed by the laws of different countries. On this basis, in 1968 the six original Member States signed the Convention on Mutual

[11] Article 249(3) EC provides that 'a directive shall be binding as to the result to be achieved, upon each Member States to which it is addressed, but shall leave to the national authorities the choice of form and methods'. Article 249(2) EC provides that 'a regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.'

[12] Council Regulation 2137/85 EEC of 25 July 1985 on the European Economic Interest grouping, OJ L199 of 31 July 1985, 1.

[13] Council Regulation (EC) 2157/2001 of 8 October 2001 on the Statute for a European company (SE), OJ 2001 L294/1.

[14] The Commission and the European Parliament preferred Art. 95. See the draft proposal of 16 October 1989, OJ C263/41 and OJ 1991 C176/1 and for the discussion: H. W. Neye, 'Kein neuer Stolperstein für die Europäische Aktiengesellschaft' [2002] *Zeitschrift für Gesellschaftsrecht* 377 f; Wiesner [2001] GmbH-Rundschau, R 461; G. F. Thoma and D. Leuering, 'Die Europäische Aktiengesellschaft – Societas Europaea' [2000] *Neue Juristische Wochenschrift* 1449; M. Lutter, 'Europäische Aktiengesellschaft – Rechtfigur mit Zukunft?' [2002] *Betriebsberater* 1, 3.

Recognition of Companies and Legal Persons.[15] It however never came into force as it was not ratified by the Netherlands.[16] The implementation of this provision would have required an international treaty, and the unanimous consent of the Member States and of their parliaments would have been necessary. Also negotiations for a Convention on cross-border mergers failed.[17] The issue is now governed by the Tenth Directive.[18] Treaties between the Member States did not develop to a useful instrument for the approximation of national company laws.

B. Free movement and the fundamental freedoms: the right of establishment

The Treaty provisions mentioned above concern the application of the right of establishment to companies and the harmonisation of the laws of the Member States. The four freedoms, especially the right of establishment (Articles 43–48 EC) and the free movement of capital (Articles 56–69 EC) provide the foundations of European company law. They also generate the precondition for a free and economical choice of location. For instance, the application of the right of establishment and to provide services has ended certain discriminatory taxation laws.[19]

The right of establishment can be regarded as the cornerstone of European company law. Articles 43(2) and 48(1) EC provide that companies established in the EC may create secondary establishments in other Member States and thus set up agencies, branches or subsidiaries

[15] See for the text: [1968] *Revue trimestrielle de droit européen* 400; for the English version: [1969] EC Bull Supp 2 and E. Stein, *Harmonization of European Company Laws* (1971), p. 525. A Convention under Art. 293 EC is not technically a Community Act, but a Treaty between the Member States. See for more details: Edwards, *EC Company Law*, pp. 384–6; B. Goldman, 'The Convention between the Member States of the European Economic Community on the Mutual Recognition of Companies and Legal Persons' [1968–69] 6 CMLR 104.

[16] E. Werlauff, *EC Company Law* (Copenhagen: Jurist– og Økonomforbundets, 1993), pp. 15–17.

[17] See for the preliminary draft of the Convention of 1967: *Comité des experts de l'article 220 alinéa 3 du Traité CEE*, '*Droit des sociétés – Fusions internationales*, *Avant-projet de convention relatif à la fusion internationale des sociétés anonymes*', *Document de travail* no. 4, 16.082/IV/67-F. See for the draft convention of 1972 EC Bull Supp 13/73 and B. Goldman '*La fusion des sociétés et le projet de convention sur la fusion internationale des sociétés anonymes*' [1981] 17 CDE 4.

[18] The Tenth Council Directive on cross-border mergers, [2005] OJ L310/1. See for the legislative history and background, P. Farmer 'Removing legal obstacles to cross-border mergers: EEC proposal for a tenth directive' [1987] *Business Law Review* 35 f., 53.

[19] See case C-62/00 *Marks & Spencer* [2002] ECR I-6325.