1

TFEU Provisions on Company Law

1.1 European Company Law: An Introduction

***Action Plan: European Company Law and Corporate Governance – A Modern Legal Framework for More Engaged Shareholders and Sustainable Companies (2012)*(COM/2012/0740 final)**

European company law is a cornerstone of the internal market. It facilitates freedom of establishment of companies while enhancing transparency, legal certainty and control of their operations.

The scope of EU company law covers the protection of interests of shareholders and others, the constitution and maintenance of public limited-liability companies' capital, branches disclosure, mergers and divisions, minimum rules for single-member private limited-liability companies and shareholders' rights as well as legal forms such as the European Company (SE), the European Economic Interest Grouping (EEIG) and the European Cooperative Society (SCE).

This definition is a good starting point. However, for the purposes of this book, it needs some further clarification. Indeed, the expression European Company Law (hereafter 'ECL') requires one to focus on the meaning of both 'company' and 'company law', on the one hand, and on the qualification 'European', on the other.

What is a company or – as it would be put in the US – a corporation? Let's take advantage of two authoritative definitions, one of which is provided for by the European Court of Justice (hereafter 'ECJ').

C-81/87, *The Queen* v. *H.M. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc.*, [1988] ECR I-*5483*, § 20

it should be borne in mind that, unlike natural persons, companies are creatures of the law and, in the present state of Community law, creatures of national law. They exist only

by virtue of the varying national legislation which determines their incorporation and functioning.

Melvin A. Eisenberg, 'The Structure of Corporation Law', 89 *Colum. L. Rev.* 1461–1525, at 1461 (1989)

A corporation is a profit-seeking enterprise of persons and assets organized by rules. Most of these rules are determined by the unilateral action of corporate organs or officials. Some of these rules are determined by market forces. Some are determined by contract or other forms of agreement. Some are determined by law.

As companies are creatures of the law, and more specifically enterprises of persons and assets organised by rules, including the law, there is an unbreakable link between companies and company law.

What, then, is company (or corporate) law? Prominent legal scholars, both European and non-European, have investigated how this question should be answered. The reading of their introductory paragraph is a very useful tool to discuss the issues considered in this book.

John Armour, Henry Hansmann and Reinier Kraakman, 'What is Corporate Law?', in Reinier Kraakman, John Armour, Paul Davies, Luca Enriques, Henry B. Hansmann, Gérard Hertig, Klaus J. Hopt, Hideki Kanda and Edward Rock, *The Anatomy of Corporate Law: A Comparative and Functional Approach* 1–35, at 1–3 (Oxford University Press, 2nd edn., 2009)

What is the *common structure* of the law of business corporations – or, as it would be put in the UK, company law – across different national jurisdictions? Although this question is rarely asked by corporate law scholars, it is critically important for the comparative investigation of corporate law. Recent scholarship often emphasizes the divergence among European, American, and Japanese corporations in corporate governance, share ownership, capital markets, and business culture. But, notwithstanding the very real differences across jurisdictions along these dimensions, the underlying uniformity of the corporate form is at least as impressive. Business corporations have a fundamentally similar set of legal characteristics – and face a fundamentally similar set of legal problems – in all jurisdictions.

Consider, in this regard, the basic legal characteristics of the business corporation. To anticipate our discussion below, there are five of these characteristics, most of which will be easily recognizable to anyone familiar with business affairs. They are: legal personality, limited liability, transferable shares, delegated management under a board structure, and investor ownership. These characteristics respond – in ways we will explore – to the economic exigencies of the large modern business enterprise. Thus, corporate law everywhere

must, of necessity, provide for them. To be sure, there are other forms of business enterprise that lack one or more of these characteristics. But the remarkable fact – and the fact that we wish to stress – is that, in market economies, almost all large-scale business firms adopt a legal form that possesses all five of the basic characteristics of the business corporation. Indeed, most small jointly-owned firms adopt this corporate form as well, although sometimes with deviations from one or more of the five basic characteristics to fit their special needs.

It follows that a principal function of corporate law is to provide business enterprises with a legal form that possesses these five core attributes. By making this form widely available and user-friendly, corporate law enables entrepreneurs to transact easily through the medium of the corporate entity, and thus lowers the costs of conducting business. Of course, the number of provisions that the typical corporation statute devotes to defining the corporate form is likely to be only a small part of the statute as a whole. Nevertheless, these are the provisions that comprise the legal core of corporate law that is shared by every jurisdiction … we briefly explore the contracting efficiencies (some familiar and some not) that accompany these five features of the corporate form, and that, we believe, have helped to propel the worldwide diffusion of the corporate form.

As with corporate law itself, however, our principal focus in this book is not on establishing the corporate form per se. Rather, it is on a second, equally important function of corporate law: namely, reducing the ongoing costs of organizing business through the corporate form. Corporate law does this by facilitating coordination between participants in corporate enterprise, and by reducing the scope for value-reducing forms of opportunism among different constituencies. Indeed, much of corporate law can usefully be understood as responding to three principal sources of opportunism: conflicts between managers and shareholders, conflicts among shareholders, and conflicts between shareholders and the corporation's other constituencies, including creditors and employees. All three of these generic conflicts may usefully be characterized as what economists call 'agency problems.' Consequently, [we examine] these three agency problems, both in general and as they arise in the corporate context, and surveys the range of legal strategies that can be employed to ameliorate those problems.

The reader might object that these agency conflicts are not uniquely 'corporate.' After all, any form of jointly-owned enterprise must expect conflicts among its owners, managers, and third-party contractors. We agree; insofar as the corporation is only one of several legal forms for the jointly-owned firm, it faces the same generic agency problems that confront all jointly-owned firms. Nevertheless, the characteristics of this particular form matter a great deal, since it is the form that is chosen by most large-scale enterprises – and, as a practical matter, the only form that firms with widely dispersed ownership can choose in many jurisdictions. Moreover, the unique features of this form determine the contours of its agency problems. To take an obvious example, the fact that shareholders enjoy limited liability – while, say, general partners in a partnership do not – has traditionally made creditor protection far more salient in corporate law than it is in partnership law. Similarly, the fact that corporate investors may trade their shares is the foundation of the anonymous trading

> stock market – an institution that has encouraged the separation of ownership from control, and so has sharpened the management-shareholder agency problem.
>
> … [We] explore the role of corporate law in minimizing agency problems – and thus, making the corporate form practicable – in the most important categories of corporate actions and decisions. More particularly, … [we] address, respectively, seven categories of transactions and decisions that involve the corporation, its owners, its managers, and the other parties with whom it deals. Most of these categories of firm activity are, again, generic, rather than uniquely corporate. For example, … [we] address governance mechanisms that operate over the firm's ordinary business decisions, whilst … [we later turn] to the checks that operate on the corporation's transactions with creditors. As before, however, although similar agency problems arise in similar contexts across all forms of jointly-owned enterprise, the response of corporate law turns in part on the unique legal features that characterize the corporate form.
>
> Taken together, … [we] cover nearly all of the important problems in corporate law … [W]e describe how the basic agency problems of the corporate form manifest themselves in the given category of corporate activity, and then explore the range of alternative legal responses that are available. We illustrate these alternative approaches with examples from the corporate law of various prominent jurisdictions. We explore the patterns of homogeneity and heterogeneity that appear. Where there are significant differences across jurisdictions, we seek to address both the sources and the consequences of those differences. Our examples are drawn principally from a handful of major representative jurisdictions, including France, Germany, Italy, Japan, the UK, and the US, though we also make reference to the laws of other jurisdictions to make special points.

After having benefitted from this comprehensive explanation, we shall turn to the qualification of company law as 'European'.

One might argue that European company law is something comparable to – let's say – Norwegian, Japanese or Swiss company law: as Norwegian, Japanese or Swiss company law is the law applicable to companies established and/or operated in Norway, Japan or Switzerland, one might reckon that European company law is the law applicable to companies established and/or operated in the EU. This reasoning, however, would be misleading as the EU is neither a sovereign State, as Norway or Japan, nor a federation of States, as Switzerland.

In some aspects, European company law may be profitably compared to the company law of the US federation. Each of the fifty States of the US federation has its own company law: whilst twenty-four States have adopted the so-called Model Business Corporation Act (the Revised MBCA dates from 1964), which is a model set of law prepared by the Committee on Corporate Laws of the Section of Business Law of the American Bar Association, other States including Delaware have drafted their own company laws. As is well known, Delaware is the State of incorporation of the majority of publicly traded corporations listed in the New York Stock Exchange (NYSE) and the NASDAQ:

hence, Delaware company law – including the Delaware General Corporation Code and the vast case law of the Delaware Supreme Court – is applicable to these and many other American companies. Federal law also plays a role in the American system of company law as it creates minimum standards for trade in company shares and governance rights, found mostly in the Securities Act of 1933 and the Securities and Exchange Act of 1934, as amended by laws like the Sarbanes–Oxley Act of 2002 and the Dodd–Frank Act of 2010. However, federal and State law operate in different fields of company law and do not overlap. Therefore, in an American company law textbook the reader would find references to Delaware law (as the most representative State company law), the Revised MBCA, and – where appropriate – to federal acts.

Quite similarly to US company law, companies established and/or operated in any of the EU Member States are regulated by the company laws of the Member States. However, on the one hand, in contrast to the US legal system, where adoption of the Revised MBCA is merely voluntary, the company laws of the Member States must comply with the rules and principles that constitute the body of ECL. On the other hand, notwithstanding the EU is neither a sovereign State nor a federation of States, its institutions may issue acts directly binding all citizens and companies established and/or operating in the EU thereby prevailing over the company laws of the Member States.

This rough comparison clearly shows that in the expression 'European company law' reference is made to the legal rules and principles of company law enshrined in the sources of law of the EU, either binding EU Member States as lawmakers or courts, or directly applicable to citizens or to companies or firms established under the laws of any EU Member State and/or operating in the EU. However, unlike US company law, that also includes State law, ECL does not include the company law of EU Member States.

Therefore, before going into the core of ECL, it is appropriate to recall how the EU creates its sources of law. Under Article 288 of the Treaty on the Functioning of the European Union (hereafter 'TFEU'):

Article 288 TFEU

To exercise the Union's competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions.

A *regulation* shall have general application. It shall be binding in its entirety and directly applicable in all Member States.

A *directive* shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.

A *decision* shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them.

Recommendations and *opinions* shall have no binding force.

There are ECL 'rules' – binding either as hard law (treaty, regulations, directives or decisions), or soft law (recommendations, opinions) – and ECL 'principles', emerging from decisions of the ECJ. All such rules and principles constitute the so-called *acquis communautaire* (a French expression meaning 'that which has been acquired or obtained'), or simply the *aquis* in the field of ECL.

The object matter of this textbook is the ECL *acquis*. Conversely, this book does not address the company law of Member States, nor the implementation in those laws of ECL directives: reference is made to the company law of Member States only in the case where it is necessary to explain choices at Union level or to assess its validity in respect of the ECL *acquis*.

In this respect, it is useful to recall that questions of validity of national company law are solved by the ECJ and may be raised before it in two ways: *either* by a European Commission complaint that a Member State has failed to fulfil an obligation under the TFEU or ECL directives, *or* by preliminary rulings in the case where a question is raised before any court or tribunal of a Member State.

Article 258 TFEU

If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.

If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union.

Article 267 TFEU

The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

(a) the interpretation of the Treaties;
(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union.

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.

If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.

FURTHER READING

Dominique Carreau and William L. Lee, 'Towards a European Company Law', 9 *Nw. J. Int'l L. & Bus.* 501–512 (1989).

Jan Wouters, 'European Company Law: Quo Vadis', 37 *Comm. Mkt L. Rev.* 257–308 (2000).

Friedrich Kübler, 'A Shifting Paradigm of European Company Law', 11 *Colum. J. Eur. L.* 219–240 (2005).

See also:

Mads Andenas and Frank Wooldridge, *European Comparative Company Law* 1–6 (Cambridge University Press, 2012).

John Armour, Henry Hansmann and Reinier Kraakman, 'What is Corporate Law?', in Reinier Kraakman, John Armour, Paul Davies, Luca Enriques, Henry B. Hansmann, Gérard Hertig, Klaus J. Hopt, Hideki Kanda and Edward Rock, *The Anatomy of Corporate Law: A Comparative and Functional Approach* 135 (Oxford University Press, 2nd edn., 2009).

1.2 Freedom of Establishment and Freedom to Provide Services

The roots of ECL can be found among early provisions of the Treaty of Rome on the European Economic Community (EEC) of 1957, concerning the freedom of establishment and the freedom to provide services. The same provisions are now incorporated in the TFEU.

As it is well known, one of the major goals of the Treaty of Rome was that of creating a European single market.

Article 26(2) TFEU

The internal market shall comprise an area without internal frontiers in which the *free movement of goods, persons, services and capital* is ensured in accordance with the provisions of the Treaties.

The cornerstones of the single market are often said to be the 'four freedoms'. Two of these fundamental freedoms – i.e. the freedom of establishment and the freedom to provide services – are especially set out to ensure the free movement of people and services. More specifically, the principle of *freedom of establishment* enables an economic operator to carry on an economic activity in a stable and continuous way in one or more Member States. The principle of the *freedom to provide services* enables an economic operator providing services in one Member State to offer services on a temporary basis in another Member State, without having to be established.

Granting those fundamental freedoms, the Treaty of Rome referred not only to national individuals, but also to business organisations. For the time being, two fundamental rules – included in Articles 49 and 56 TFEU – shall be considered.

Article 49 TFEU

Restrictions on *freedom to provide services* within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended.

Article 56 TFEU

Restrictions on the *freedom of establishment* of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.

Article 49(2) TFEU further clarifies the concept of freedom of establishment for business activities, in that it specifies that this includes the right *to set up and manage undertakings, in particular companies or firms*.

Article 49(2) TFEU

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and *to set up and manage undertakings, in particular companies or firms,* under the conditions laid down by Member States where such establishment is effected for their own nationals.

FURTHER READING

Jesper Lau Hansen, 'Full Circle: Is There a Difference between the Freedom of Establishment and the Freedom to Provide Services?', 11 *EBL* (2000) 83–90.

Alexandros Roussos, 'Realising the Free Movement of Companies', 12 *EBLR* 7–25(2001).

See also:

Erik Werlauff, *EU Company Law* 57–61 (Copenhagen, DJØF Publishing, 2nd edn., 2003).

Mads Andenas and Frank Wooldridge, *European Comparative Company Law* 7–14 (Cambridge University Press, 2012).

Alberto Santamaria, *European Economic Law* 9–53 (Alphen aan den Rijn, Kluwer Law International, 3rd edn., 2014).

1.3 Companies and Firms

Companies and firms referred to in Article 49 TFEU are defined in Article 54(2) TEFU.

Article 54(2) TFEU

'companies or firms' ... constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making.

To understand such a provision, we shall consider that national laws regulate business organisations in various ways. Some EU Member States (such as France, Belgium, Germany and Spain) have a civil and a commercial code, along with special acts, providing a legal framework governing firms and companies (including partnerships). Some other EU Member States (such as Italy and the Netherlands) only have a civil code, some (such as Portugal and Poland), have a civil code and a company code, some (such as Ireland and the UK) have no civil nor commercial codes, but the common law and special acts for partnerships and companies. Those countries having both a civil and a commercial code differentiate firms or companies (and partnerships) constituted under civil or commercial law.

Diego Corapi and Barbara De Donno, 'European Corporate Law', in Mauro Bussani and Franz Werro (eds.), *European Private Law: A Handbook*, Volume II 209–260, at 216–217 (Durham, NC, Carolina Academic Press and Stämpfli Publishers, 2014)

Companies and partnerships are commercial entities, which in the Roman legal tradition are treated differently than other associations (*sociétés civiles, associations*). The latter are less structured entities, whose purpose is not considered as belonging to the realm of commerce. The distinction was for a long time reflected in the fact that companies and partnerships were made subject to commercial codes, while other associations were governed by the provisions of civil codes.

French law has opened new operational areas to *sociétés civiles*, making the regulation of the latter in many respects similar to that of commercial entities, not only in the domains of agriculture, mining and real estate, but also in the liberal professions.

Today some countries (including France, Belgium, Germany and Spain) maintain separate civil and commercial codes. In others (such as Italy, the Netherlands and Switzerland) there is a unified civil code, which also covers the matters traditionally dealt with in commercial codes. Even in those countries in which the distinction between commercial and civil companies has been formally eliminated, however, it continues to play a role doctrinally. This is similar to the situation under English law where, since the eighteenth century, commercial law has been incorporated into the common law. In the United Kingdom, therefore, both agricultural and professional activities exercised in association are governed by the Partnership Act, which applies to entities whose nature is similar to that of what the civil law calls 'civil companies'.

In civil law countries (even where a separate commercial code exists) the definition of a company, as shared by all incorporate associations, as a rule in the civil code: art. 1832 of the French civil code, BGB § 705, art. 2247 of the Italian Civil Code.

The regulation of commercial companies, including public limited companies, is contained either in unified civil codes (as in Italy and Switzerland), commercial codes (in France and Belgium) or special laws. In Germany and Spain, for example, partnerships are governed by the commercial code, public limited companies and limited liability companies are subject to special legislation.

In the United Kingdom, because the notion of contract is narrower than in the civil law countries and is thus unable to comprise within it the phenomenon of incorporation, partnerships and companies are regulated separately, in special acts, which often give legislative expression to principles that were developed in case law.

Notwithstanding these differences in the law of the Member States, all these firms and companies (including partnerships) are regarded identically from an EU perspective, as all enjoy the freedom of establishment and to provide services.

Companies and firms, both civil and commercial ones, are generally set up to pursue business activities for the profit of their members, hence these are profit-making and engage in economic activity. Non-profit-making societies do not benefit from the right of establishment. This rule may be understood because non-profit-making societies do not engage in economic activity and are not considered undertakings in the light of the TFEU. Indeed only undertakings (and Member States) are the addressees of the European common rules on competition, taxation and approximation of laws, ensuring along with the right of establishment and to provide services the creation of an economic single market.

Cooperative societies do not pursue the aim of making profits for distribution to their members. Rather, they are set up for the purpose of providing services on a non-profit basis either to, or in the interest of, their members. However, in the light of TFEU, they are not regarded as non-profit-making entities as they are considered undertakings, thereby also contributing to the formation of the single market. Therefore, as undertakings, they must comply with the EU rules on competition, whilst enjoying of the freedom of establishment.

In this respect it is useful to recall two leading cases before the ECJ, in which the qualification of a cooperative society as an undertaking was disputed. Both cases concerned mutual societies providing pension schemes in France (for either farmers or craftsmen). Membership and, therefore, contributions to such mutual societies were mandatory by law. Some members, however, objected that such legal rules violated the prohibition of an abuse of dominant position (Article 102 TFEU), as they precluded the possibility to freely choose other (better performing) pension schemes offered by undertakings providing