



# EUROPEAN COMPANY LAW



INTRODUCTION

## S.MOCK, HARMONISATION, REGULATION AND LEGISLATIVE COMPETITION IN EUROPEAN CORPORATE LAW, in Ger. Law Jour., 2002

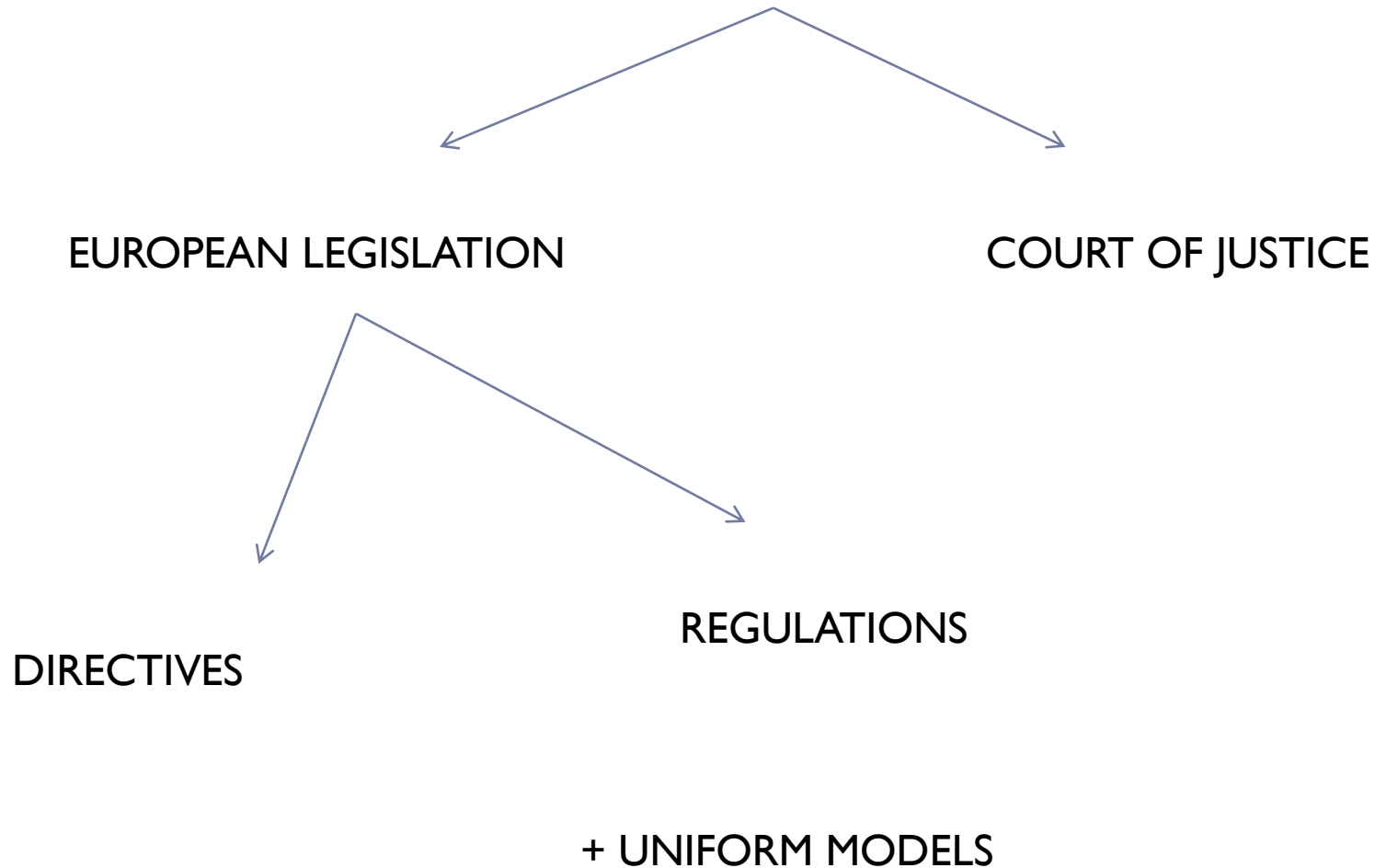
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*“Investors and companies are more attracted by foreign markets which are **similar** to their own markets. A harmonized Corporate Law therefore attracts companies and investors to expand into the markets of the other Member States. Due to the harmonization of Corporate Law, trade among Member States is expected to increase and national markets are seen to become more integrated into the European Common Market. Finally, a harmonized Corporate Law gives the European Community more influence on the international development and debate on Corporate Law.”*

“The process of harmonization of Corporate Law in the European Community has to be seen **in relation to the right of establishment of companies** (art. 43, 48 EC). The freedom to create subsidiaries and branches in other Member States with different Corporate Laws could lead to different legal conditions for creditors. As a consequence, the creditors of such subsidiaries and branches are confronted with a different legal system than the creditors of the holding company. Therefore the harmonization of the national Corporate Laws was regarded as a **necessary compensation for the right of establishment** of companies. All creditors should ideally be in same legal position and should have the same rights even if in the context of different national Corporate Laws. In theory, **the differences of the national Corporate Laws should be of no importance to the choice of one Member state for the establishment of a company**. Instead, firms should consider economic aspects, not the corporate law of a Member State, when deciding where to incorporate. The harmonization process therefore is focused on the creation of a **legal playing field**. Another aspect of the harmonization process was the creation of **equal conditions in competition for the companies in all Member States**. The differences among the national Corporate Laws should not give advantages or disadvantages to certain companies. Corporate Law should therefore also have to be neutral to competition.”

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## SOVEREIGNTY

- ▶ **approximation of laws**
- ▶ ***freedom of establishment***
- harmonisation***

- ▶ The European Union is based on the rule of law. This means that every action taken by the EU is **founded on treaties** that have been approved voluntarily and democratically by all EU member countries. For example, if a policy area is not cited in a treaty, the Commission cannot propose a law in that area.
- ▶ **A treaty is a binding agreement between EU member countries.** It sets out EU objectives, rules for EU institutions, how decisions are made and the relationship between the EU and its member countries.
- ▶ Treaties are amended to make the EU more efficient and transparent, to prepare for new member countries and to introduce new areas of cooperation – such as the single currency.
- ▶ Under the treaties, EU institutions can adopt legislation, which the member countries then implement. The complete texts of treaties, legislation, case law and legislative proposals can be viewed using the EUR-Lex database of EU law.

- ▶ The aims set out in the EU treaties are achieved by several types of legal act. Some are binding, others are not. Some apply to all EU countries, others to just a few.
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## **Regulations**

- ▶ A "regulation" is a binding legislative act. It must be applied in its entirety across the EU. For example, when the EU wanted to make sure that there are common safeguards on goods imported from outside the EU, the Council adopted a regulation.

## **Directives**

- ▶ A "directive" is a legislative act that sets out a goal that all EU countries must achieve. However, it is up to the individual countries to devise their own laws on how to reach these goals. One example is the EU consumer rights directive, which strengthens rights for consumers across the EU, for example by eliminating hidden charges and costs on the internet, and extending the period under which consumers can withdraw from a sales contract.

## Decisions

- ▶ A "decision" is binding on those to whom it is addressed (e.g. an EU country or an individual company) and is directly applicable. For example, the Commission issued a decision on the EU participating in the work of various counter-terrorism organisations. The decision related to these organisations only.

## Recommendations

- ▶ A "recommendation" is not binding. When the Commission issued a recommendation that EU countries' law authorities improve their use of videoconferencing to help judicial services work better across borders, this did not have any legal consequences. A recommendation allows the institutions to make their views known and to suggest a line of action without imposing any legal obligation on those to whom it is addressed.

## Opinions

- ▶ An "opinion" is an instrument that allows the institutions to make a statement in a non-binding fashion, in other words without imposing any legal obligation on those to whom it is addressed. An opinion is not binding. It can be issued by the main EU institutions (Commission, Council, Parliament), the Committee of the Regions and the European Economic and Social Committee. While laws are being made, the committees give opinions from their specific regional or economic and social viewpoint. For example, the Committee of the Regions issued an opinion on the clean air policy package for Europe.



# Article 288

## (ex Article 249 TEC)

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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.

# Article 5 TUE (ex Article 5 TEC)

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1. The limits of Union competences are governed by the principle of **conferral**. The use of Union competences is governed by the principles of **subsidiarity** and **proportionality**.
2. Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.
3. Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level. The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol.
4. Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties. The institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality.

# LEGISLATION

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## ▶ BASIS

- ▶ Article 50 TFEU (ex Article 44 TEC): *In order to attain **freedom of establishment** as regards a particular activity, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, shall act by means of **directives**.*

# Article 352 TFEU (ex Article 308 TEC) [s.c. flexibility clause]

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1. If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, **and the Treaties have not provided the necessary powers**, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures. Where the measures in question are adopted by the Council in accordance with a special legislative procedure, it shall also act unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament.

2. Using the procedure for monitoring the subsidiarity principle referred to in Article 5 of the Treaty on European Union, the Commission shall draw national Parliaments' attention to proposals based on this Article.

3. Measures based on this Article **shall not entail harmonisation of Member States' laws or regulations in cases where the Treaties exclude such harmonisation**.

4. This Article cannot serve as a basis for attaining objectives pertaining to the common foreign and security policy and any acts adopted pursuant to this Article shall respect the limits set out in Article 40, second paragraph, of the Treaty on European Union.

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1. The Union shall adopt measures with the aim of **establishing or ensuring the functioning of the internal market**, in accordance with the relevant provisions of the Treaties.

2. 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.

3. The Council, on a proposal from the Commission, shall determine the guidelines and conditions necessary to ensure balanced progress in all the sectors concerned.

- ▶ Article 54 TFEU (ex Article 48 TEC): Companies or firms formed in accordance with the law of a Member State and having their **registered office, central administration or principal place of business** within the Union shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States

**FIRST COUNCIL DIRECTIVE of 9 March 1968** on co-ordination of safeguards which, for the **protection of the interests of members and others**, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community

- ▶ *abolition of restrictions on freedom of establishment* is a matter of urgency, especially in regard to companies limited by shares or otherwise having limited liability, **since the activities of such companies often extend beyond the frontiers of national territories**

- ▶ the co-ordination of national provisions concerning disclosure, the validity of obligations entered into by, and the nullity of, such companies is of special importance, particularly for the **purpose of protecting the interests of third parties**
- ▶ **the basic documents of the company should be disclosed** in order that third parties may be able to ascertain their contents and other information concerning the company, especially particulars of the persons who are authorised to bind the company
- ▶ the protection of third parties must be ensured by provisions which **restrict to the greatest possible extent the grounds on which obligations entered into in the name of the company are not valid**



- ▶ it is necessary, in order to ensure certainty in the law as regards relations between the company and third parties, and also between members, to **limit the cases in which nullity can arise and the retroactive effect of a declaration of nullity, and to fix a short time limit within which third parties may enter objection to any such declaration**

# **DIRECTIVE (EU) 2017/1132 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 14 June 2017 relating to certain aspects of company law (codification)**

- ▶ (2) The coordination provided for in Article 50(2)(g) of the Treaty and in the General Programme for the abolition of restrictions on freedom of establishment, which was begun by the First Council Directive 68/151/EEC (10), is especially important in relation to public limited liability companies because their activities predominate in the economy of the Member States and **frequently extend beyond their national boundaries.**
- ▶ (3) In order to ensure minimum equivalent protection for both shareholders and creditors of public limited liability companies, the coordination of national provisions relating to the formation of such companies and to the maintenance, increase or reduction of their capital is particularly important.

- ▶ (4) In the Union, the statutes or instrument of incorporation of a public limited liability company must make it possible for any interested person to **acquaint oneself with the basic particulars of the company**, including the exact composition of its capital.
- ▶ (5) The **protection of third parties** should be ensured by provisions which **restrict to the greatest possible extent the grounds on which obligations entered into in the name of companies limited by shares or otherwise having limited liability are not valid**.
- ▶ (6) It is necessary, in order to ensure certainty in the law as regards relations between companies and third parties, and also between members, to **limit the cases in which nullity can arise and the retroactive effect of a declaration of nullity, and to fix a short time limit within which third parties may enter an objection to any such declaration**.

- ▶ (7) The coordination of national provisions concerning disclosure, the validity of obligations entered into by, and the nullity of, companies limited by shares or otherwise having limited liability, is of special importance, particularly for the purpose of protecting the interests of third parties.
- ▶ (8) **The basic documents of a company should be disclosed** in order for third parties to be able to ascertain their contents and other information concerning the company, especially particulars of the persons who are authorised to bind the company.

# HARMONISATION

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- ▶ **FREEDOM OF ESTABLISHMENT**
- ▶ **SAFE TRADE**
- ▶ **EQUAL OPPORTUNITIES  
BETWEEN COMPETITORS**

## ▶ FREEDOM OF ESTABLISHMENT - EFFECTIVE

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## ▶ HARMONISATION

### ▶ Topics:

- ▶ Protection of the shareholders
- ▶ Improvement of the shareholders' engagement and participation
- ▶ Protection of the creditors
- ▶ Protection of the third parties
- ▶ Corporate governance

## ▶ DIMINISH DIFFERENCES