

European Company Law

Italian and European Company Law – A.A. 2024/2025

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→ The European Union and their competences:
Title I (categories and areas of Union
competence) of the Treaty on the Functioning of
the European Union (TFUE)

→ Where can we find the field of Company Law?
(Art. 2, par. 5 and art. 6 TFUE)

Purpose of ECL:

- facilitation of freedom of establishment of companies
- improve transparency, legal certainty and the operations control
- protection of interests of shareholders and other stakeholders, constitution and maintenance of public limited-liability companies' capital, branches disclosure, mergers and divisions, minimum rules for single-member private limited-liability companies

Article 3 (ex Article 2 TEU)

[...]

3. The Union shall establish an **internal market**. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.

It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child.

It shall promote economic, social and territorial cohesion, and solidarity among Member States.

It shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced.

4. The Union shall establish an economic and monetary union whose currency is the euro.

[...]

Internal Market

Legal bases:

Articles 4(2)(a), 26, 27, 114 and 115 of the Treaty on the Functioning of the European Union (TFEU).

Article 26, TFEU

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.
- [...]

Freedom of establishment

Legal basis:

Articles 26 (internal market), 49 to 55 (establishment) of the Treaty on the Functioning of the European Union (TFEU).

The freedom of establishment guarantee mobility of businesses and professionals within the EU.

Self-employed persons and professionals or **legal persons** within the meaning of Article 54 TFEU who are legally operating in one Member State may: (i) carry out an economic activity in a stable and continuous way in another Member State (**freedom of establishment**: Article 49 TFEU); or (ii) offer and provide their services in other Member States on a temporary basis while remaining in their country of origin (**freedom to provide services**: Article 56 TFEU). This implies **eliminating discrimination on the grounds of nationality** and, if these freedoms are to be used effectively, the adoption of measures to make it easier to exercise them, including the harmonisation of national access rules or their mutual recognition.

The **right of establishment** includes the right to take up and pursue activities as a self-employed person, and **to set up and manage undertakings**, for a permanent activity of a stable and continuous nature, **under the same conditions** as those laid down by the law of the Member State concerned regarding establishment for its own nationals.

Article 49, TFEU

1. Within the framework of the provisions set out below, **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.

2. **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 within the meaning of the second paragraph of Article 54, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital.**

Companies established and/or operated in any of the EU member states are regulated by the Company Law of the Member States; they are creature of the law.

How do we know that a corporation is subject to the law of a member state?

The application of national law to a company follows two main criteria of connection:

→ the *incorporation theory*

→ the *real seat theory*

Article 54, TFEU

1. 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.

2. "Companies or firms" means 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.

What do we need to make the right of establishment effective?

Article 50, TFEU

1. 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 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.

To enjoy the freedom of establishment and provide services granted to the TFEU we need a **common legal framework on Company Law** applicable throughout all the EU Member States.

This does not necessarily imply the unification of the legislations of member states into a single uniform law.

It is sufficient that national legislations share common basic principles.

This goal can be achieved through approximation of laws or harmonization.

(see art. 50, par. 2, TFEU)

Although in general Company law tends to be uniform throughout the world because it responds to the same needs, some legal institutes may be very different from one state to another, because they depend on the cultural and legal traditions of each state.

An effective corporate governance framework creates a positive EU-wide business environment in the internal market. The objective of harmonising company law is to promote the achievement of freedom of establishment (Title IV, Chapter 2 of the TFEU) and to implement the fundamental right laid down in Article 16 of the Charter of Fundamental Rights of the European Union, the freedom to conduct a business within the limits of Article 17 of the Charter (right to property).

These objectives are followed through the instrument of the **Directive**.

The purpose of EU rules in this area is to enable businesses to be set up anywhere in the EU, enjoying the freedom of movement of persons, services and capital, to provide protection for shareholders and other parties with a particular interest in companies, to make businesses more competitive, and to encourage businesses to cooperate over borders.

→ There have been, since the European Community was founded in 1957, a series of Directives creating minimum standards for business across the European Union.

→ A central aim restated in each Directive is to reduce the barriers to freedom of establishment of businesses in the European Union through a process of harmonizing the basic laws.

→ When laws are harmonized, business will not be deterred by different or more onerous laws, but at the same time harmonization provides a basic level of protection for investors in each member State, none of which are forced into regulatory competition.

Directives:

- First Company Law Directive 68/151/EEC on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States, now replaced by Directive 2017/1132/EU (codification)
- Second Company Law Directive 77/91/EEC, on formation of public companies and the maintenance and alteration of capital, now replaced by Directive 2017/1132/EU (codification)
- Third Company Law Directive 78/855/EEC, on mergers of public companies, now replaced by Directive 2017/1132/EU (codification)
- Fourth Company Law Directive 78/660/EEC, on accounting standards, now replaced by Directive 2013/34/EU

- Draft Fifth Company Law Directive, on structure of public companies, shareholder right to determine director pay and co-determination
- Sixth Company Law Directive 82/891/EEC, on division of public companies, now replaced by Directive 2017/1132/EU (codification)
- Seventh Company Law Directive 83/349/EEC, on group accounts, now replaced by Directive 2013/34/EU
- Eighth Company Law Directive 84/253/EEC, on audit requirements (no longer in force) replaced by Audit Directive 2006/43/EC ('new eighth')

- Draft Ninth Company Law Directive, on corporate groups
- Tenth Company Law Directive 2005/56/CE, on cross border mergers of public companies
- Eleventh Company Law Directive 89/666/EEC, on disclosure of branches established by overseas companies, now replaced by Directive 2017/1132/EU (codification)
- Twelfth Company Law Directive 89/667/EEC on single member companies, now replaced by Single Member Company Directive 2009/102/EC

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

TITLE I - GENERAL PROVISIONS AND THE ESTABLISHMENT AND FUNCTIONING OF LIMITED LIABILITY COMPANIES

- Chapter II - Incorporation and nullity of the company and validity of its obligations (first directive)
- Chapter III - Disclosure and interconnection of central, commercial and companies registers (eleventh directive)
- Chapter IV - Capital maintenance and alteration (second directive)

TITLE II MERGERS AND DIVISIONS OF LIMITED LIABILITY COMPANIES

- Chapter I - Mergers of public limited liability companies (third directive)
- Chapter II - Cross-border mergers of limited liability companies (tenth directive)
- Chapter III - Divisions of public limited liability companies (sixth directive)

<https://eur-lex.europa.eu/legal-content/IT/TXT/?uri=CELEX%3A32017L1132>

(actually the Directive is changed: see the current consolidated version)

Company Law Package:

- Directive 2019/1151/EU amending Directive (EU) 2017/1132 as regards the use of digital tools and processes in company law
- Directive 2019/2021/EU amending the Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions

Listed companies

- Takeover Bids Directive 2004/25/EC, on takeover bids (also called 'Thirteenth Company Law Directive')
- Draft Fourteenth Company Law Directive, on the cross-border transfer of the registered office
- Market Abuse Directive 2003/6/EC
- Transparency of Listed Companies Directive 2004/109/EC
- Shareholder Rights Directive 2007/36/EC, on shareholder rights in listed companies
- Shareholder Rights Directive 2017/828/EU, on shareholder rights in listed companies (SHRD II)

Uniform Company Law

The EU institutions create a uniform company law that provides EU types of companies or firms, entirely or partially regulated by EU sources of law, acting by means of regulations.

Also, EU institutions use the mean of regulation to establish common rules directly applicable to companies and firms established under the law of member states (e.g. the IAS/IFRS accounting standards, or the regulation of cross-border insolvency proceedings)

Regulation:

- Regulation (EEC) No 2137/85 of 25 July 1985 on the European Economic Interest Grouping (EEIG)
- Regulation (EC) No 2157/2001, of 8 October 2001 on the Statute for a European Company (SE)
- Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (Societas Cooperativa Europaea-SCE)
- Proposal for a Council Regulation of 25 June 2008 on the Statute for a European Private Company

- Proposal for a Regulation of the European Parliament and of the Council on the statute for a European Mutual Society
- Proposal for a Council Regulation on the Statute for a European Foundation (FE)
- Proposal for a directive on single-member private companies with limited liability, called the Societas Unius Personae (SUP)

- Regulation 2002/1606/EC of the European Parliament and of the Council of 19 July 2002 on the application of international accounting standards (IAS/IFRS)
- Regulation (EU) No 2015/848 on insolvency proceedings

European Model Company Law Act:

- soft law
- model law that brings together best practices from member states' legal systems, from which all the member states can take inspiration
- optional, non-binding adoption
- the purpose is to provide a basic outline to be used as a model for national legislation and to create harmonization through a malleable tool

What is currently the level of harmonization of the “European Company Law”?

Consider:

- failed attempts at harmonization...
- the jurisprudence of the EU Court of Justice...
- so-called bottom-up harmonization...