European Company Law

Italian and European Company Law – A.A. 2025/2026

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The European Union and its scopes

The Treaty on European Union

Article 1

By this Treaty, the HIGH CONTRACTING PARTIES establish among themselves a EUROPEAN UNION, hereinafter called 'the Union', on which the Member States confer competences to attain objectives they have in common.

This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen.

The Union shall be founded on the present Treaty and on the Treaty on the Functioning of the European Union (hereinafter referred to as 'the Treaties'). Those two Treaties shall have the same legal value. The Union shall replace and succeed the European Community.

The legal nature of the European Union

Any consideration of the legal nature of the EU must start by looking at its characteristic features. Although the EU's legal nature was set out in two precedent-setting judgments of the Court of Justice in 1963 and 1964 relating to the then European Economic Community, the judgments are still valid for the European Union in its current form.

Van Gend & Loos

In this legal dispute, the Dutch transport company Van Gend & Loos filed an action against the Dutch customs authorities for imposing an import duty on a chemical product from Germany that was higher than duties on earlier imports. The company considered this an infringement of the earlier Article 12 of the Treaty establishing the European Economic Community (EEC Treaty), which prohibited the introduction of new import duties or any increase in existing customs duties between the Member States. The court in the Netherlands then suspended the proceedings and referred the matter to the Court of Justice for clarification as regards the scope and legal implications of the abovementioned article of the EEC Treaty.

Van Gend & Loos

The Court of Justice used this case as an opportunity to set out a number of observations of a fundamental nature concerning the legal nature of the EEC. In its judgment, the Court stated the following:

"The objective of the EEC Treaty, which is to establish a Common Market, the functioning of which is of direct concern to interested parties in the Community, implies that this Treaty is more than an agreement which merely creates mutual obligations between the contracting states. This view is confirmed by the preamble to the Treaty which refers not only to governments but to peoples. It is also confirmed more specifically by the establishment of institutions endowed with sovereign rights, the exercise of which affects Member States and also their citizens.

[…]

The conclusion to be drawn from this is that the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals."

Costa v ENEL

Just a year later, Case 6/64 Costa v ENEL gave the Court of Justice an opportunity to set out its position in more detail. The facts of this case were as follows. In 1962, Italy nationalised the production and distribution of electricity and transferred the assets of the electricity undertakings to the national electricity board, ENEL. As a shareholder of Edison Volta, one of the companies that was nationalised, Mr Costa considered that he had been deprived of his dividend and consequently refused to pay an electricity bill for ITL 1 926. In proceedings before the arbitration court in Milan, one of the arguments put forward by Mr Costa to justify his conduct was that the nationalising act infringed a number of provisions of the EEC Treaty. In order to be able to assess Mr Costa's submissions in his defence, the court requested that the Court of Justice interpret various aspects of the EEC Treaty. In its judgment, the Court of Justice stated the following in relation to the legal nature of the EEC:

Costa v ENEL

"By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which … became an integral part of the legal systems of the Member States and which their courts are bound to apply. By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the states to the Community, the Member States have limited their sovereign rights and have thus created a body of law which binds both their nationals and themselves."

Costa v ENEL

On the basis of its detailed observations, the Court reached the following conclusion:

“It follows from all these observations that the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question.

The transfer by the states from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail.”

The legal nature of the European Union

In the light of these judgments, the elements which together typically characterise the special legal nature of the EU are:

■ the institutional set-up, which ensures that action by the EU is also characterised by the overall European interest, i.e. is reflected in or influenced by the EU interest as laid down in the objectives;

■ the transfer of powers to the EU institutions to a greater degree than in other international organisations, and extending to areas in which states normally retain their sovereign rights;

■ the establishment of its own legal order, which is independent of the Member States' legal orders;

■ the direct applicability of EU law, which makes provisions of EU law fully and uniformly applicable in all Member States, and bestows rights and imposes obligations on both the Member States and their citizens;

■ the primacy of EU law, which ensures that EU law may not be revoked or amended by national law and that it takes precedence over national law if the two conflict.

The EU is thus an autonomous entity with its own sovereign rights and a legal order independent of the Member States, to which both the Member States themselves and their nationals are subject within the EU's areas of competence.

The legal nature of the European Union

The EU has, by its very nature, certain features in common with the usual kind of international organisation or federal-type structure, as well as a number of differences.
The only feature that the EU has in common with the traditional international organisations is that it too came into being as a result of international treaties. However, the EU has already moved a long way from these beginnings. This is because the treaties establishing the EU led to the creation of an independent Union with its own sovereign rights and responsibilities. The Member States have ceded some of their sovereign powers to this Union and transferred them to the EU so that they can be exercised jointly.
Through these differences between the EU and the traditional type of inter national organisation, the EU is in the process of acquiring a status similar to that of an individual state. In particular, the Member States' partial surrender of sovereign rights was taken as a sign that the EU was already structured along the lines of a federal state. However, this view fails to take into account that the EU institutions only have powers in certain areas to pursue the objectives specified in the treaties. This means that they are not free to choose their objectives in the same way as a sovereign state; nor are they in a position to meet the challenges facing modern states today. The EU has neither the comprehensive jurisdiction enjoyed by sovereign states nor the powers to establish new areas of responsibility ('jurisdiction over jurisdiction').
The EU is therefore neither an international organisation in the usual sense nor an association of states, but rather an autonomous entity somewhere in between the two. In legal circles, the term 'supranational organisation' is now used.

The Treaty on European Union

Article 2
The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

The Treaty on European Union

Article 3

1. The Union's aim is to promote peace, its values and the well-being of its peoples.

2. The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime.

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.

Treaty on The Functioning of The European Union

Article 26

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.

The internal market with its characteristic four freedoms (Article 26 TFEU) is a core element of the Treaty on the Functioning of the European Union: free movement of goods (Article 34), free movement of persons (Articles 45 and 49), freedom to provide services (Article 57) and free movement of capital (Article 63).

Creating a larger entity by linking 27 states affords at the same time freedom of movement beyond national frontiers. This means, in particular, freedom of movement for workers, freedom of establishment, freedom to provide services, free movement of goods and free movement of capital. These fundamental freedoms guarantee business people freedom of decision-making, workers freedom to choose their place of work and consumers freedom of choice between the greatest possible variety of products. Freedom of competition permits businesses to offer their goods and services to an incomparably wider circle of potential customers. Workers can seek employment and change job according to their own wishes and interests throughout the entire territory of the EU. Consumers can select the cheapest and best products from the far greater range of goods on offer that results from increased competition.

The powers of the European Union

The treaties establishing the European Union do not confer on the EU institutions any general power to take all measures necessary to achieve the objectives of the treaties, but lay down in each chapter the extent of the powers to act. As a basic principle, the EU and its institutions do not have the power to decide on their legal basis and competencies; the principle of specific conferment of powers (Article 2 TFEU) continues to apply. This method has been chosen by the Member States in order to ensure that the surrender of their own powers can be more easily monitored and controlled.

The range of matters covered by the specific conferment of powers varies according to the nature of the tasks allotted to the EU. Competences that have not been transferred to the EU remain in the exclusive power of the Member States. The EU Treaty explicitly states that matters of national security stay under the exclusive authority of the Member States.

The powers of the European Union

This naturally begs the question of where the dividing line is between EU competencies and those of the Member States. This dividing line is drawn on the basis of three categories of competence.

Exclusive competence of the EU (Article 3 TFEU): in areas where it can be assumed that a measure at the EU level will be more effective than a measure in any Member State that is not coordinated. These areas are clearly set out and comprise the customs union, the establishing of the competition rules necessary for the functioning of the internal market, the monetary policy of the euro states, the common commercial policy and parts of the common fisheries policy. In these policy areas only the European Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the EU or for the implementation of EU acts (Article 2(1) TFEU).

The powers of the European Union

Shared competence between the EU and the Member States (Article 4 TFEU) in areas where action at the EU level will add value over action by Member States. There is shared competence for internal-market rules; economic, social and territorial cohesion; agriculture and fisheries; environment; transport; trans-European networks; energy supply; and the area of freedom, security and justice. Shared competence also covers common safety concerns in public health matters; research and technological development; space; development cooperation; and humanitarian aid. In all these areas the EU can exercise competence first, but only with regard to matters laid down in the relevant European Union instrument, and not to the entire policy area. The Member States exercise their competence to the extent that the EU has not exercised, or has decided to cease exercising, its competence (Article 2(2) TFEU). The latter situation arises when the relevant EU institutions decide to repeal a legislative act, in particular to respect the principles of subsidiarity and proportionality. The Council may, on the initiative of one or more of its members, request that the Commission submit proposals for repealing a legislative act.

The powers of the European Union

Competence to carry out supporting action (Article 6 TFEU). The EU's competence to carry out supporting action is limited to coordinating or providing complementary action for the action of the Member States; the EU cannot harmonise national law in the areas concerned (Article 2(5) TFEU). Responsibility for drafting legislation therefore continues to lie with the Member States, which thus have considerable freedom to act. The areas covered by this category of competence are the protection and improvement of human health, industry, culture, tourism, education, youth, sport, vocational training, civil protection and administrative cooperation. In the areas of employment and economic policy, the Member States explicitly acknowledge the need to coordinate national measures within the EU.

The powers of the European Union

In addition to these special powers to act, the EU treaties also confer on the institutions a power to act when it is essential for the operation of the single market or for ensuring undistorted competition (see Article 352 TFEU – dispositive powers or flexibility clause). These articles do not, however, confer on the institutions any general power enabling them to carry out tasks that lie outside the objectives laid down in the treaties, and the EU institutions cannot extend their powers to the detriment of those of the Member States. In practice, the possibilities afforded by this power were used very often in the past, since the EU was over time repeatedly faced with new tasks that were not foreseen at the time the founding treaties were concluded, and for which accordingly no appropriate powers were conferred in the treaties.

The powers of the European Union

Finally, there are further powers to take such measures as are indispensable for the effective and meaningful implementation of powers that have already been expressly conferred (implied powers). These powers have acquired a special significance in the conduct of external relations. They enable the EU to assume obligations towards non-EU countries or other international organisations in fields covered by the list of tasks entrusted to the EU. An outstanding example is provided by the Kramer case ruled on by the Court of Justice. This case concerned the EU's capacity to cooperate with international organisations in fixing fishing quotas and, where considered appropriate, to assume obligations on the matter under international law. Since there was no specific provision laid down in the EU Treaty, the Court inferred the necessary external competence of the EU from its internal competence for fisheries policy under the common agricultural policy.

The powers of the European Union

However, in the exercise of these powers, the EU is governed by the subsidiarity principle, taken over from Roman Catholic social doctrine, which has acquired virtually constitutional status through being embodied in the EU Treaty (Article 5(3) TEU). There are two facets to it: the affirmative statement that the EU must act where the objectives to be pursued can be better attained at the Union level, which enhances its powers; and the negative statement that it must not act where objectives can be satisfactorily attained by the Member States acting individually, which constrains them. This is automatically to be assumed for the areas of the exclusive competence of the EU, and as a result any subsidiarity check can be dispensed with in these areas. For all other areas of responsibility, however, what this means in practice is that all EU institutions, but especially the Commission, must always demonstrate that there is a real need for common rules and common action. To paraphrase Montesquieu, when it is not necessary for the EU to take action, it is necessary that it should take none. If the need for EU rules is demonstrated, the next question that arises concerns the intensity and the form that they should take. The answer flows from the principle of proportionality, which is established in the EU Treaty in conjunction with the competence provisions (Article 5(4) TEU). It means that the need for the specific legal instrument must be thoroughly assessed to see whether there is a less constraining means of achieving the same result. The main conclusion to be reached in general terms is that framework regulations, minimum standards and mutual recognition of the Member States' existing standards should be preferred to excessively detailed legal provisions, and harmonising provisions should be avoided wherever possible.

The European Union’s means of action

The attainment of the objectives pursued by the EU requires that its bodies undertake actions that make it possible for the European Union to align the disparate economic, social and, not least, environmental conditions in the various Member States. EU law must therefore provide a set of legal instruments.
When the EEC was set up, legislators thus faced the difficult task of ‘developing’ a range of instruments that were aligned with the structures and responsibilities of the Community. The first priority was to decide what forms these legal instruments should take and what effects they should have. The institutions had to be able to align the disparate economic, social and, not least, environmental conditions in the various Member States, and do so effectively, i.e. without depending on the goodwill of the Member States, so that the best possible living conditions could be created for all the citizens of the EU.

The European Union’s means of action

Against this background a range of instruments was developed that al lowed the EU institutions to impact on the national legal systems to varying degrees. The most drastic action is the replacement of national rules by EU ones. There are also EU rules by which the EU institutions act on the Member States’ legal systems only indirectly. Measures may also be taken that affect only a defined or identifiable addressee, in order to deal with a particular case. Lastly, provision is also made for legal acts that have no binding force, either on the Member States or on the citizens of the EU.

The European Union's means of action: regulations

The legal acts that enable the EU institutions to impinge furthest on the domestic legal systems are the regulations. Two features highly unusual in international law mark them out.

■ The first is their EU nature, which means that they lay down the same law throughout the EU, regardless of international borders, and apply in full in all Member States. A Member State has no power to apply a regulation incompletely or to select only those provisions of which it approves as a means of ensuring that an instrument that it opposed at the time of its adoption or that runs counter to its perceived national interest is not given effect. Nor can it invoke provisions or practices of domestic law to preclude the mandatory application of a regulation.

■ The second is direct applicability, which means that the legal acts do not have to be transposed into national law but confer rights or impose obligations on the EU citizen in the same way as national law. The Member States and their governing institutions and courts are bound directly by EU law and have to comply with it in the same way as with national law.

The European Union’s means of action: directives

Alongside the regulation, the directive is the most important legislative instrument. Its purpose is to reconcile the dual objectives of securing the necessary uniformity of EU law and respecting the diversity of national traditions and structures. What the directive therefore primarily aims for is not the unification of the law, which is the regulation’s purpose, but its harmonisation. The idea is to remove contradictions and conflicts between national laws and regulations or gradually iron out inconsistencies so that, as far as possible, the same material conditions exist in all the Member States. The directive is one of the primary means deployed in building the single market.
A directive is binding on the Member States as regards the objective to be achieved but leaves it to the national authorities to decide on how the agreed EU objective is to be incorporated into their domestic legal systems. The reasoning behind this form of legislation is that it allows intervention in domestic economic and legal structures to take a milder form. In particular, Member States can take account of special domestic circumstances when implementing EU rules. What happens is that the directive does not supersede the laws of the Member States, but places the Member States under an obligation to adapt their national law in line with EU provisions.

The European Union’s means of action: directives

The result is generally a two-stage lawmaking process:

First, at the initial stage, the directive lays down the objective that is to be achieved at the EU level by any or all Member States to which it is addressed within a specified time frame. The EU institutions can actually spell out the objective in such detailed terms as to leave the Member States with no room for manoeuvre, and this has in fact been done in directives on technical standards and environmental protection.

The European Union's means of action: directives

The result is generally a two-stage lawmaking process:

Second, at the national stage, the objective set out at the EU level is translated into actual legal or administrative provisions in the Member States. Even if the Member States are in principle free to determine the form and methods used to transpose their EU obligation into domestic law, EU criteria are used to assess whether they have done so in accordance with EU law. The general principle is that a legal situation must be generated in which the rights and obligations arising from the directive can be recognised with sufficient clarity and certainty to enable the EU citizen to invoke or, if appropriate, challenge them in the national courts. This normally involves enacting mandatory provisions of national law or repealing or amending existing rules. Administrative custom on its own is not enough since it can, by its very nature, be changed at will by the authorities concerned, nor does it have a sufficiently high profile.

The European Union’s means of action: decisions

By means of ‘decisions’, the Treaty of Lisbon made an addition to the range of legal instruments. A distinction can be made between two categories of decision: decisions that specify those to whom they are addressed, and general decisions that do not have any specific addressees (cf. Article 288(4) TFEU). Whereas the decisions that specify those to whom they are addressed replace the previous decisions for regulating individual cases, the general decisions that do not have specific addresses encompass a variety of instruments that have in common the fact that they do not regulate individual cases. It is regrettable that two very different types of legal instrument are referred to by the same name, as the inevitable issues of definition give rise to a great deal of legal uncertainty. It would have been better to use one term for measures providing for individual cases, with external, legally binding effect on the individual, and to introduce an additional term for the other legal instruments with binding force.

The European Union’s means of action: recommendations and opinions

A final category of legal measures explicitly provided for in the treaties is recommendations and opinions. They enable the EU institutions to express a view to Member States, and in some cases to individual citizens, that is not binding and does not place any legal obligation on the addressee.

The European Union’s means of action: recommendations and opinions

In recommendations, the party to whom they are addressed is called on, but not placed under any legal obligation, to behave in a particular way. For example, in cases where the adoption or amendment of a legal or administrative provision in a Member State causes a distortion of competition in the internal market, the Commission may recommend to the state concerned such measures as are appropriate to avoid this distortion (cf. Article 117(1), second sentence, TFEU).

The European Union’s means of action: recommendations and opinions

Opinions, on the other hand, are issued by the EU institutions when giving an assessment of a given situation or developments in the EU or individual Member States. In some cases, they also prepare the way for subsequent, legally binding acts, or are a prerequisite for the institution of proceedings before the Court of Justice (cf. Articles 258 and 259 TFEU).

The European Union’s means of action: resolutions, declarations and action programmes

Alongside the legal acts provided for in the treaties, the EU institutions also have available a variety of other forms of action for forming and shaping the EU legal order. The most important of these are resolutions, declarations and action programmes.

The European Union’s means of action: resolutions, declarations and action programmes

Resolutions. Resolutions may be issued by the Parliament, the European Council and the Council. They set out jointly held views and intentions regarding the overall process of integration and specific tasks within and outside the EU. Resolutions relating to the internal working of the EU are concerned, for example, with basic questions regarding political union, regional policy, energy policy and economic and monetary union (particularly the European Monetary System). The primary significance of these resolutions is that they help to give the future work of the Council a political direction. As manifestations of a commonly held political will, resolutions make it considerably easier to achieve a consensus in the Council, in addition to which they guarantee at least a minimum degree of correlation between decision-making hierarchies in the EU and the Member States. Any assessment of their legal significance must also take account of these functions, i.e. they should remain a flexible instrument and not be tied down by too many legal requirements and obligations.

The European Union’s means of action: resolutions, declarations and action programmes

Declarations. There are two different kinds of declaration. If a declaration is concerned with the further development of the EU, such as the declaration on the EU, the declaration on democracy and the declaration on fundamental rights and freedoms, it is more or less equivalent to a resolution. Declarations of this type are mainly used to reach a wide audience or a specific group of addressees. The other type of declaration is issued in the context of the Council’s decision-making process, and sets out the views of all or individual Council members regarding the interpretation of the Council’s decisions. Interpretative declarations of this kind are standard practice in the Council and are an essential means of achieving compromises. Their legal significance should be assessed under the basic principles of interpretation, according to which the key factor when interpreting the meaning of a legal provision should in all cases be the underlying intention of its originator. This principle is only valid, however, if the declaration receives the necessary public attention; this is because, for example, secondary EU legislation granting direct rights to individuals cannot be restricted by sec ondary agreements that have not been made public.

The European Union’s means of action: resolutions, declarations and action programmes

Action programmes. These programmes are drawn up by the Council and the Commission on their own initiative or at the instigation of the European Council, and serve to put into practice the legislative programmes and general objectives laid down in the treaties. If a programme is specifically provided for in the treaties, the EU institutions are bound by those provisions when planning it. On the other hand, other programmes are in practice merely regarded as general guidelines with no legally binding effect. They are, however, an indication of the EU institutions’ intended actions.

The European Union’s means of action: resolutions, declarations and action programmes

…. White Papers and Green Papers are also of considerable importance in the Union. White Papers are published by the Commission and contain concrete proposals for EU measures in a specific policy area. If a White Paper is favourably received by the Council, it may form the basis for an EU action programme. Examples of this include the White Papers on the future of Europe (2017) and artificial intelligence (2020). Green Papers are intended to stimulate discussion on given topics at the EU level and form the basis for public consultation and debate regarding the topics dealt with in the Green Paper. They may give rise to legislative developments that are then outlined in White Papers.

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.

The institutions and bodies of the European Union

Another question arising in connection with the constitution of the European Union is that of its organisation. What are the institutions of the EU? Since the EU exercises functions normally reserved for states, does it have a government, a parliament, administrative authorities and courts like those with which we are familiar in the Member States? Action on the tasks assigned to the EU and the direction of the integration process was intentionally not left to Member States or to international cooperation. The EU has an institutional system that equips it to give new stimuli and objectives to the unification of Europe and to create a body of law that is uniformly devised and binding in all the Member States in the matters falling within its responsibility. The main players in the EU institutional system are the institutions – the European Parliament, the European Council, the Council of the European Union, the European Commission, the Court of Justice of the European Union, the European Central Bank and the European Court of Auditors. The ancillary bodies in the institutional system of the EU are the European Investment Bank, the European Economic and Social Committee and the European Committee of the Regions.

The institutions and bodies of the European Union

Article 13 TEU (institutional framework)
(1) The Union shall have an institutional framework which shall aim to promote its values, advance its objectives, serve its interests, those of its citizens and those of the Member States, and ensure the consistency, effectiveness and continuity of its policies and actions.
The Union's institutions shall be:
– the European Parliament,
– the European Council,
– the Council,
– the European Commission,
– the Court of Justice of the European Union,
– the European Central Bank,
– the Court of Auditors.
(2) Each institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them. The institutions shall practise mutual sincere cooperation.
(3) The provisions relating to the European Central Bank and the Court of Auditors and detailed provisions on the other institutions are set out in the Treaty on the Functioning of the European Union.
(4) The European Parliament, the Council and the Commission shall be assisted by an Economic and Social Committee and a Committee of the Regions acting in an advisory capacity.

The Court of Justice of the European Union (Article 19 TEU)

Any system will endure only if its rules are supervised by an independent authority. What is more, in a union of states there is a risk of the common rules – if they are subject to control by the national courts – being interpret ed and applied differently from one state to another. The uniform application of EU law in all Member States would thus be jeopardised. These considerations led to the establishment of a Community Court of Justice in 1952, as soon as the first Community (the ECSC) was created. In 1957, it also became the judicial body for the other two Communities (E(E)C and Euratom). The Court of Justice of the European Union has its seat in Luxembourg.

Today it is the judicial body of the EU. The judicial work is now carried out on two levels by:

■ the Court of Justice, as the highest instance in the legal order of the EU (Article 253 TFEU); and

■ the General Court (Article 254 TFEU). In 2004, to relieve the burden on the Court of Justice and improve legal protection in the EU, the Council attached a specialised court for civil-ser vice cases to the General Court (see Article 257 TFEU). In 2015, however, the EU legislature decided to gradually increase the number of judges at the General Court (to 54 in 2020) and to transfer to it the jurisdiction of the Civil Service Tribunal. The Tribunal was thus dissolved on 1 September 2016.

The Court of Justice of the European Union (Article 19 TEU)

The Court of Justice is the highest judicial authority in matters of EU law. In general terms, its task is to ‘ensure that in the interpretation and application of the treaties the law is observed’.

This general description of responsibilities encompasses three main areas:

- monitoring the application of EU law, both with regard to the conduct of the EU institutions when implementing treaty provisions and with regard to the fulfilment of obligations under EU law by the Member States and individuals;
- interpretation of EU law;
- further shaping of EU law.

The Court of Justice of the European Union: references for a preliminary ruling

The Court of Justice cooperates with all the courts of the Member States, which are the ordinary courts in matters of European Union law. To ensure the effective and uniform application of European Union legislation and to prevent divergent interpretations, the national courts may, and sometimes must, refer to the Court of Justice and ask it to clarify a point concerning the interpretation of EU law, so that they may ascertain, for example, whether their national legislation complies with that law. A request for a preliminary ruling may also seek the review of the validity of an act of EU law.

The Court of Justice's reply is not merely an opinion, but takes the form of a judgment or reasoned order. The national court to which it is addressed is, in deciding the dispute before it, bound by the interpretation given. The Court's decision is similarly binding on other national courts before which the same issue is raised.

It is thus through references for a preliminary ruling that any European citizen can seek clarification of the European Union rules which affect him. Although such a reference can be made only by a national court, all the parties to the proceedings before that court, as well as the Member States and the institutions of the European Union, may take part in the proceedings before the Court of Justice. In this way, several important principles of EU law have been laid down by preliminary rulings, sometimes in response to questions referred by national courts of first instance.

Company Law in the European Union

→ 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?

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

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.

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.**

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.

The right of establishment

PRIMARY ESTABLISHMENT

The right to set up and manage companies or firm in any member States, under the same condition laid down for their own nationals

SECONDARY ESTABLISHMENT

The right to set up agencies, branches or subsidiaries in any Member States, under the same conditions laid down for their own nationals

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.

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

→ the *incorporation theory*

→ the *real seat theory*

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

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**.
[…]

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.

The purpose of EU rules in this area is to enable businesses to be set up anywhere in the EU, enjoying the free 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.

These objectives are followed through the instrument of the **Directive**.
In some occasions, however, harmonization may also be pursued by using more stringent **regulation instrument** (especially in the areas of major interest for the internal market, where the competence of the EU is exclusive)

→ 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 codified in the Directive 2017/1132/EU

The directive applied to all companies and covered the following issues:
1) disclosure by companies of some documents
2) Validity of obligations entered into by a company
3) Nullity of the company

Second Company Law Directive 77/91/EEC, on formation of public companies and the maintenance and alteration of capital, now codified in the Directive 2017/1132/EU

1) incorporation of joint stock companies
2) minimum legal capital
3) operations on the share capital
4) profit distribution

Third Company Law Directive 78/855/EEC, on mergers of public companies, now codified in the Directive 2017/1132/EU

Regarding the internal mergers of joint stock companies. It regulates:
1) the merger by the acquisition of one or more companies by another and
2) the merger by the formation of a new company

Fourth Company Law Directive 78/660/EEC, on accounting standards, now replaced by Directive 2013/34/EU: provides the coordination of national provisions concerning the presentation and content of annual accounts and annual reports, the valuation methods used therein and their publication in respect of certain companies with limited liability because its special importance for the protection of members and third parties

Draft of the **Fifth Company Law Directive**, on structure of public companies, shareholder right to determine director pay and co-determination (1972)

The aim of this proposal was to coordinate Member States' regulations concerning the structure of joint stock companies, the powers and obligations of corporate bodies, and the general meeting of shareholders.
However, the proposal was modeled on the structure of joint stock companies under German company law, and no agreement was reached.
The proposal was finally withdrawn on December 11, 2001.

Sixth Company Law Directive 82/891/EEC, on division of public companies, now codified in the Directive 2017/1132/EU

Regarding the internal divisions of joint stock companies. It regulates:
1) the division by acquisition
2) the division by the formation of new companies

Seventh Company Law Directive 83/349/EEC, on group accounts, now replaced by Directive 2013/34/EU

It regulates the conditions for the preparation of consolidated accounts, their preparation, their auditing, and their publication.

Eighth Company Law Directive 84/253/EEC, on audit requirements (no longer in force) replaced by Audit Directive 2006/43/EC (‘new eighth’)

It lays down minimum requirements regarding the professional qualifications and independence of persons responsible for the (external) audit of accounts.

- **Draft Ninth Company Law Directive**, on corporate groups (1974/75 and 1984)

The proposal touched very sensitive issues like the formation of groups and the protection to be accorded to shareholders and creditors of companies belonging to the groups; it encountered fierce opposition from many member States and was finally rejected.

- **Tenth Company Law Directive** 2005/56/CE, on cross-border mergers of public companies, codified in the Directive 2017/1132/EU

It was motivated by the recognition that companies from different Member State encounter many legislative and administrative difficulties in the process of consolidation. it was considered necessary, with a view to the completion and functioning of the single market, to lay down provisions to facilitate the carrying out of cross-border mergers between various types of limited liability companies governed by the laws of different Member States.

- **Eleventh Company Law Directive** 89/666/EEC, on disclosure of branches established by overseas companies, now codified in the Directive 2017/1132/EU

Provides for the rule concerning the disclosure requirements imposed in a Member State for branches of companies governed by the law of another state in order to deliver an equivalent level of protection for shareholders and third parties.

- **Twelfth Company Law Directive** 89/667/EEC on single member companies, now replaced by Single Member Company Directive 2009/102/EC (it regards only the private limited liability companies)

It creates the possibility of the limitation of liability for individual entrepreneurs and allowing a single member private companies to established .

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 I - Subject matter
- 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 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)

Actually the Directive is changed: see the current consolidated version
https://eur-lex.europa.eu/legal-content/IT/TXT/?uri=CELEX%3A32017L1132

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

- Chapter I - Subject matter
- Chapter II - Incorporation and nullity of the company and validity of its obligations (first directive)
- Chapter III - Online procedures (formation, registration and filing), disclosure and registers (eleventh directive and Directive 2019/1151/EU as regards the use of digital tools and processes in company law)
- Chapter IV - Capital maintenance and alteration (second directive)

TITLE II - CONVERSIONS, MERGERS AND DIVISIONS OF LIMITED LIABILITY COMPANIES

- Chapter–I - Cross-border conversions (Directive 2019/2021/EU as regards cross-border conversions, mergers and divisions)
- 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)
- Chapter IV - Cross-border divisions of limited liability companies (Directive 2019/2021/EU as regards cross-border conversions, mergers and divisions)

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 (2013)
- Market Abuse Directive 2003/6/EC, no longer in force, replaced by Regulation (EU) No 596/2014 on market abuse (market abuse regulation)
- 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 provide common rules directly applicable to companies and firms enstablished 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

https://pure.uva.nl/ws/files/42103448/22019834.pdf

What is currently the level of harmonization of the "European Company Law"?

To answer this question, we will need to consider:
- the jurisprudence of the EU Court of Justice…
- the harmonization provided for by EU directives (and failed attempts)…
- the so-called bottom-up harmonization (or, better, the regulatory competition among the Member States)…