European Company Law

Text, Cases and Materials

Taking a text, cases and materials approach, this is the first and only student textbook on European Company Law, providing an insight and shedding light on its future development. Text boxes for explanatory commentary, cases and materials – such as EU legislation, official documents and excerpts from scholarly papers – are clearly differentiated from the text, allowing the student quickly to identify sources. Each chapter also includes suggestions for further reading. Structured in seven parts, the book explores a diversity of topics, from what European company law is, the common rules for establishing, financing and accounting in a company and corporate governance, to the structure of the *Societas Europaea* Statute, EU company law directives, capital markets and takeover law and insolvency. The book is an essential resource for the growing number of graduate courses on European Company Law, European Business Law and Comparative Corporate Law.

Nicola de Luca is Professor of Law at the Second University of Naples and Luiss Guido Carli, Rome. His research and teaching interests include business and company law, bankruptcy, corporate governance, shareholders' rights and insurance law. His publications include four monographs, a co-authored company law textbook, and numerous journal articles.

European Company Law

Text, Cases and Materials

NICOLA DE LUCA
LUISS Guido Carli – Rome

CAMBRIDGE
UNIVERSITY PRESS

CAMBRIDGE
UNIVERSITY PRESS

University Printing House, Cambridge CB2 8BS, United Kingdom

One Liberty Plaza, 20th Floor, New York, NY 10006, USA

477 Williamstown Road, Port Melbourne, VIC 3207, Australia

4843/24, 2nd Floor, Ansari Road, Daryaganj, Delhi – 110002, India

79 Anson Road, #06–04/06, Singapore 079906

Cambridge University Press is part of the University of Cambridge.

It furthers the University's mission by disseminating knowledge in the pursuit of education, learning, and research at the highest international levels of excellence.

www.cambridge.org
Information on this title: www.cambridge.org/9781107184183
10.1017/9781316875469

First published 2017

Printed in (country) by (printer) in (date)

A catalogue record for this publication is available from the British Library.

Library of Congress Cataloging-in-Publication Data
Names: De Luca, Nicola, author.
Title: European company law : text, cases and materials / Nicola de Luca.
Description: New York : Cambridge University Press, 2017.
Identifiers: LCCN 2016049340 | ISBN 9781107184183 (hardback)
Subjects: LCSH: Corporation law – Europe. | Business enterprises – Law and legislation – Europe. | BISAC: LAW / Corporate.
Classification: LCC KJC2432 .D4 2017 | DDC 346.4/066–dc23
LC record available at https://lccn.loc.gov/2016049340

ISBN 978-1-107-18418-3 Hardback
ISBN 978-1-316-63537-7 Paperback

To Grazia, and to all my students.

Contents

List of Cases

Abbreviations and Acronyms

Text

AG	Aktiengesellschaft
BBG	Undesbeschaffung GmbH (Austrian Federal Procurement Agency)
BGHZ	Bundesgerichtshof in Zivilsachen
CESR	Committee of European Securities Regulators (now ESMA)
CFO	Chief Financial Officer
CJEU	Court of Justice of the European Union
CLD	Company Law Directive
COMI	centre of main interests
CRD	Capital Requirements Directive
DG ENTR	Directorate-General for Enterprise and Industry
d. lgs.	Decreto legislativo
EEA	European Economic Area
EEC	European Economic Community
EC	European Community
ECGI	European Corporate Governance Institute
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms
ECJ	European Court of Justice
ECL	European Company Law
ECOFIN/Ecofin	Economic and Social Affairs Council
EEC	European Economic Community
EEIG	European Economic Interest Grouping
EESC	European Economic and Social Committee
ESMA	European Securities and Markets Authority
EU	European Union
FC	Foreign Company
FE	*Fundatio Europaea* (European Foundation)
FSAP	Financial Services Action Plan

GAAP	Generally Accepted Accounting Principles (US)
GmbHG	Gesellschaft mit beschränkter Haftung (Law on limited-liability companies, Germany)
I+R	Interest and Royalty
IAS	International Accounting Standard
IASB	International Accounting Standards Board
IASC	International Accounting Standards Committee
IFRIC	International Financial Reporting Interpretations Committee
IFRS	International Financial Reporting Standards
IFSC	International Financial Services Centre
IMI	Internal Market Information System
IPO	initial public offering
ISA	International Standards on Auditing
LLP	limited-liability partnership
LSA	Ley de Sociedades Anònimas (now LSC)
LSC	Ley de Sociedades Comerciales
MAD	Market Abuse Directive
MBCA	Model Business Corporation Act
ME	*Mutua Europaea* (European Mutual Society)
MEP	Member of the European Parliament
MiFID	Markets in Financial Instruments Directive
MTF	multilateral trading facility
NA	National Association (Bank of America)
NYSE	New York Stock Exchange
OECD	Organisation for Economic Cooperation and Development
OTC	over-the-counter (transaction)
OTF	organised trading facilities
PLC	public limited company
RGDN	Dirección General de los Registros y del Notariado (Spanish General Direction of Register)
ROL	recapitalise or liquidate
SBA	Small Business Act
SBI	Social Business Initiative
SCE	*Societas Cooperativa Europaea* (European Cooperative Society)
SE	*Societas Europaea* (European Private Company)
SEC	Securities and Exchange Commission (US)
SIC	Standards Interpretation Committee
SLIM	Simpler Legislation for the Internal Market
SME	small and medium-sized enterprise
SPE	*Societas Privata Europaea* (European Private Company)

SUP	*Societas Unius Personae* (European Single-member Company)
TFEU	Treaty on the Functioning of the European Union
UCIT	undertakings for the collective investment in transferable securities
UGB	Unternehmensgesetzbuch (Austrian commercial code)
UK	United Kingdom
UmwG	Law on Company Transformations (Germany)
UNICITRAL	United Nations Commission on International Trade Law
US	United States
VAT	value-added tax
WFBV	Law on Formally Foreign Countries (Netherlands)

Law Journals

Brook. J. Int'l L.	Brooklyn Journal of International Law
Bus. Law.	Business Lawyer
Cal. L. Rev.	University of California Law Review
Cardozo J. Int'l & Comp. L.	Cardozo Journal of International and Comparative Law
Cardozo l. Rev.	Cardozo Law Review
Colum. J. Eur. L.	Columbia Journal of European Law
Colum. L. Rev.	Columbia Law Review
Comm. Mkt L. Rev.	Common Market Law Review
Cornell L. Rev.	Cornell Law Review
Del. J. Corp. L.	Delaware Journal of Corporate Law
EBL	European Business Law
EBLR	European Business Law Review
EBOR	European Business Organization Law Review
ECFR	European Company and Financial Law Review
ECL	European Company Law
EC Tax Rev.	EC Tax Review
Geo. L.J.	Georgetown Law Journal
Harv. Int'l L.J.	Harvard International Law Journal
Harv. L. Rev.	Harvard Law Review
Hous. J. Int'l L.	Houston Journal of International Law
Indus. L.J.	Industrial Law Journal
Int'l L. & Mgmt Rev.	International Law & Management Review
J. Corp. Fin.	Journal of Corporation Finance
JFE	Journal of Financial Economics
J. Int'l L.	Journal of International Law
JLEO	Journal of Law, Economics, & Organization
Mich. L. Rev.	Michigan Law Review
MLR	Modern Law Review

Nw. J. Int'l L. & Bus.	Northwestern Journal of International Law & Business
QJE	Quarterly Journal of Economics
Richmond J. Global L. & B.	Richmond Journal of Global Law and Business
So. Cal. L. Rev.	Southern California Law Review
Texas Int'l L.J.	Texas International Law Journal
UCLA L. Rev.	University of California at Los Angeles Law Review
U. Pa Int'l Econ. L.J.	University of Pennsylvania International Economic Law Journal
U. Pa L. Rev.	University of Pennsylvania Law Review
Va J. of Int'l L.	Virginia Journal of International Law
Va L. Rev.	Virginia Law Review
Yale L.J.	Yale Law Journal

Preface

This book deals with European Company Law. Whilst many are (more or less) aware of what a company is, and of the fields that company law covers, a clarification of the adjective 'European' is required.

Similarly to the US or other federal systems, companies established and/or operated in any of the Member States of the European Union (hereafter EU) are regulated by the company laws of the Member States. However, on the one hand, the company laws of the Member States must comply with some rules and principles which constitute the body of a supranational set of laws delivered by the EU institutions, binding as either hard or soft law. On the other hand, notwithstanding that the EU is no 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.

Therefore, the adjective 'European' qualifying company law here is intended to make direct reference to the legal rules and principles of company law enshrined in the sources of law of the EU. In turn, this book is not intended to deal with the individual/domestic company laws of EU Member States.

Since European Company Law has become an important study matter for lawyers of EU Member States, many European (and not only European) universities offer courses in European Company Law, or broader courses including European Company Law (such as European Business Law or Comparative Company Law). Therefore, this book aims to give an insight into the existing European Company Law and shed some light on its foreseeable future development. It includes seven Parts. Part I explains what European Company Law is, where it comes from and where it is potentially going. Part II illustrates how companies formed under EU Member States' laws may enjoy of the freedom of establishment and of that to provide services. Parts III–IV describe the common rules for establishing, financing and accounting in a company. Part V concerns corporate governance, including management and control, shareholders' rights and general meeting issues. Parts III–V reflect the structure of the SE (*Societas Europaea*) Statute, whilst also discussing the EU Company Law Directives. Part VI gives a brief overview of capital markets and takeover law. Part VII deals with

merger and division, as well as with winding-up, liquidation and insolvency of companies (based on the Regulation on Insolvency Proceedings). Each Part is further divided into chapters and paragraphs. The book is designed so that the reader may easily recognise explanatory commentary, cases and materials (EU legislation, European Court of Justice (ECJ) cases, official documents, or excerpts from scholarly papers) as well as references for further reading (scholarly papers or other cases and materials): these references are mainly designed to support more in-depth study (papers or final dissertations).

Indeed, this book is expressly designed to support law students – both in residence and those visiting an exchange programme basis – and to help familiarise them with European Company Law. The book itself is the outcome of many years teaching this subject at Luiss University – Guido Carli in Rome and is dedicated to my wife Grazia, and to all my students. I wish to thank those who gave me their class notes, read earlier drafts and provided me with valuable comments from a 'consumer perspective'. I am deeply indebted to Andrea Napolitano and Matteo Fittante, former students, now research assistants, not only for all their help in the research and in proofreading, but also for the discussions on many of the topics in this book. A special thanks goes to Benjamin Button-Stephens, also a former visiting student at Luiss University – Guido Carli, for the linguistic revision. This book would have not come to fruition without their support. The usual disclaimers apply.

Part I

The Origins and Future of European Company Law

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*: 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).

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

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

similar services. Notwithstanding the facts and the complaints were very similar, the ECJ resolved the two cases in different ways: in so doing, the Court clarified the concept of non-profit-making organisation.

In the older case (Joined cases C-159/91 and C-160/91, *Poucet et Pistre*, [1993] ECR I-00637), the EJC stated that the notion of undertaking encompasses all entities engaged in an economic activity. However, it does not include organisations involved in the management of the public social security system, although qualifying as cooperative or mutual societies, which fulfil an exclusively social function and perform an activity based on the principle of national solidarity that is entirely non-profit-making.

In a subsequent case (Case C-244/94, *Caisse d'Assurance et de Prévoyance Mutuelle des Agriculteurs et al.*, [1995] ECR I-04013), the ECJ distinguished its precedent. On this occasion, it clarified that a non-profit-making organisation (i.e. a mutual society) which manages an old-age insurance scheme intended to supplement a basic compulsory scheme, established by law as an optional scheme and operating according to the principle of capitalisation, engages in an economic activity, thus qualifying as undertaking for the purposes of Article 101 et seq. TFEU. Even if such an organisation is non-profit-making, and the scheme it administers exhibits certain limited features of solidarity that are not comparable with the features that characterise compulsory social security schemes, it nevertheless carries on an economic activity in competition with life assurance companies.

FURTHER READING

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 (Durham, NC, Carolina Academic Press and Stämpfli Publishers, 2014).

Joined cases C-159/91 and C-160/91, *Poucet et Pistre*, [1993] ECR I-00637; Case C-244/94, *Caisse d'Assurance et de Prévoyance Mutuelle des Agriculteurs et al.*, [1995] ECR I-04013. *See also*: Mads Andenas and Frank Wooldridge, *European Comparative Company Law* 99–168 (Cambridge University Press, 2012).

Stefano Lombardo, 'Some Reflections on Freedom of Establishment of Non-profit Entities in the European Union', 14 *EBOR* 225–263 (2013).

1.4 European 'Citizenship' for Companies or Firms

As with individual nationals, one may discuss a European 'citizenship' for companies and firms. European citizenship for both individuals and companies or firms depends on the existence of a connecting factor – i.e. the circumstances that make a linkage between a person and a country – with one of the EU Member States.

Individuals are considered citizens of the EU based on the connecting factor referred to by the laws of the single Member States. Common Law Member

States (along with Denmark) rely on the *domicile*. There are three forms of domicile for individuals:

(a) *domicile of origin*, acquired at birth, and depending on the parents' domicile, not on the place of birth nor on the parents' residence at that time;
(b) *domicile of dependence*, conferred on legally dependent persons by operation of law (such as for underage children or mentally incapable persons);
(c) *domicile of choice*, acquired by independent person residing in a country with the intention to settle indefinitely.

Civil law Member States generally rely on *nationality*: apart from cases of naturalisation, nationality depends essentially on the place of birth and/or on parentage, and is independent from the place of residence (ordinary or habitual).

Legal entities, such as companies or firms, also enjoy EU citizenship based on a connecting factor with one Member State. Common law EU Member States, along with some others (such as the Netherlands and, basically, Italy) adopt the *incorporation theory*, similar to the place of birth, as the connecting factor for individuals. Civil law Member States (such as Germany, France, and Hungary) generally adopt the *real seat theory*, similar to the domicile of choice as the connecting factor for individuals. Under the incorporation theory, a company is governed by the law of the place of incorporation. Under the real seat theory, a company is governed by the law of the place where the central management and control is located.

The TFEU has made no choice as to whether the incorporation theory or the real seat theory should prevail. As the ECJ puts it:

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*, § 21

The legislation of the Member States varies widely in regard to both the factor providing a connection to the national territory required for the incorporation of a company and the question whether a company incorporated under the legislation of a Member State may subsequently modify that connecting factor … The Treaty has taken account of that variety in national legislation.

Indeed:

Article 54 TFEU

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 be treated … in the same way as natural persons who are nationals of Member States.

Given the above, the ECJ concludes that:

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*, § 21

the Treaty places on the same footing, as connecting factors, the registered office, central administration and principal place of business of a company.

In further decisions on the right of establishment for companies and firms, the ECJ has frequently dealt with the consequences of the choice made by the EU founders. We will later examine in detail several cases concerning the so-called right of primary establishment, such as *Daily Mail* (*see* Chapter 5, § 5.3) and the so-called right of secondary establishment (*see*, Chapter 5, § 5.6), as well as cases involving the insolvency of companies having their registered office or principal place of business spread across different EU Member States (the cross-border insolvency): in these cases, reference is made to a company's centre of main interests or COMI, under Article 3 Regulation 2015/848/EU (*see*, Chapter 20, §§ 20.4ff.).

FURTHER READING

Paschalis Paschalidis, *Freedom of Establishment and Private International Law for Corporations* 1–11 (Oxford University Press, 2012). *See also*: Dan Prentice, 'The Incorporation Theory – The United Kingdom', 14 *EBLR* 631–641 (2003).

1.5 Participation in the Capital of Companies or Firms and Free Movement of Capital

It is not only Member States that may not put restrictions on the freedom for companies or firms to provide services and to establish within the Union, but also:

Article 55 TFEU

Member States shall accord nationals of the other Member States the same treatment as their own nationals as regards participation in the capital of companies or firms.

This provision is strictly linked to that granting the free movement of capital.

Article 63(1) TFEU

All restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited.

The combination of the two principles – that of equal treatment of shareholders being nationals of other Member States and that of free movement of capital – led the ECJ to deliver many important decisions assessing the validity of laws, granting special powers to Member States themselves or other public bodies, as shareholders of companies operating in strategic sectors, such as gas and power or telecommunication. As we will see later (Chapter 16, § 16.7), minority holdings, called *golden shares*, often grant to Member States or other public bodies the right to elect additional board members, or to compulsorily repurchase the majority stake at will, or to express a majority in a meeting regardless of the stake. The EC and the ECJ generally consider the special powers granted by golden shares contrary to the free movement of capital as they often restrain or compromise the market for corporate control.

FURTHER READING

Guido Ferrarini, 'One Share – One Vote: A European Rule?', 3 *ECFR* 147–177 (2006). *See also*: Mads Andenas and Frank Wooldridge, *European Comparative Company Law* 14–20 (Cambridge University Press, 2012).

1.6 Approximation of Company Laws

Companies or firms formed under the laws of Member States could not effectively enjoy the freedom of establishment and provide services granted by the TFEU in the absence of a common legal framework on company law applicable throughout all EU Member States.

The establishment of such a common legal framework does not necessarily imply unification of the Member States' legislations in a single uniform law. Rather, it suffices that the national legislations share common basic principles. This end may be reached by way of approximation of laws or harmonisation.

In order to attain freedom of establishment as regards a particular activity, and in particular in respect to that of companies and firms, the TFEU authorises:

Article 50(1) TFEU

the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, [to] act by means of directives.

As regards companies and firms, the European Parliament and the Council may issue directives aiming at granting the freedom of establishment or, under a different procedure, other goals.

Article 50(2) TFEU

...

(f) by effecting the progressive abolition of restrictions on freedom of establishment in every branch of activity under consideration, both as regards the conditions for setting up agencies, branches or subsidiaries in the territory of a Member State and as regards the subsidiaries in the territory of a Member State and as regards the conditions governing the entry of personnel belonging to the main establishment into managerial or supervisory posts in such agencies, branches or subsidiaries;

(g) by coordinating to the necessary extent the safeguards which, for the protection of the interests of members and others, are required by Member States of companies or firms within the meaning of the second paragraph of Article 54 with a view to making such safeguards equivalent throughout the Union.

Article 115 TFEU

Without prejudice to Article 114, the Council shall, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament and the Economic and Social Committee, issue directives for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the internal market.

As we will see (Chapter 2), the European Parliament and the Council have jointly delivered (or cooperated in the delivery of) many directives in the field of the law of companies and firms.

FURTHER READING

Bartlomiej Kurcz, 'Harmonisation by Means of Directives: A Never Ending Story', 12 *EBLR* 287–307 (2001).

Luca Enriques, 'EU Company Law Directives and Regulations: How Trivial Are They?', 27 *U. Pa Int'l Econ. L.J.* 1–72 (2006).

Gerard Hertig and Joseph A. McCahery, 'Optional Rather than Mandatory EU Company Law: Framework and Specific Proposals', 3 *ECFR* 341–362 (2006). *See also*: Mads Andenas and Frank Wooldridge, *European Comparative Company Law* 20–28 (Cambridge University Press, 2012).

Erik Werlauff, *EU Company Law* 61–71 (Copenhagen, DJØF Publishing, 2nd edn., 2003).

1.7 Uniform Company Law

As the provisions included in the TFEU constitute the body of a uniform ECL of which Member States' nationals, companies or firms directly enjoy, so the EU institutions may also create uniform company law and EU types of companies or firms, entirely or partially regulated by EU sources of law, acting by means of regulations.

Action by means of regulations sometimes requires a high degree of convergence, depending on whether Article 114(1) or 352 TFEU apply.

Article 114(1) TFEU

Save where otherwise provided in the Treaties, the following provisions shall apply for the achievement of the objectives set out in Article 26 [*thus*, in case measures are adopted with the aim of establishing or ensuring the functioning of the internal market]. The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.

The EU institution may act following the ordinary legislative procedure set out in Article 294 TFEU, or – where appropriate – a special procedure set out in Article 352 TFEU.

Article 352 TFEU

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(3) 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.

Either on an ordinary or special legislative procedure, the European Parliament and the Council have jointly delivered (or cooperated in the delivery of) various regulations over time, both establishing common rules directly applicable to companies or firms established under the laws of Member States (e.g. the adoption of IAS/IFRS accounting standards, or the regulation on cross-border insolvency proceedings), and European types of companies or firms. As we will later see in more detail (Chapter 3, §§ 3.1–3.3), regulations establishing three models of EU business organisations already exist: on the European Economic Interest Grouping (EEIG), on the *Societas Europaea* (SE) and on the *Societas Cooperativa Europaea* (SCE).

The adoption of some other regulations is currently under discussion, in particular that on the *Mutua Europaea* (ME) and on the *Fundatio Europaea* (FE). Moreover, whilst the one on the *Societas Privata Europaea* (SPE) has been dropped, another project – the *Societas Unius Personae* (SUP) – has replaced it: as we will see (Chapter 3, § 3.7), however, this new project is supposed to take the form of a Directive.