



Company Law... alone?

- Not just **hard law**
 - Statutory law
- Increasing importance of **soft law**
 - **Voluntarily applicable** codes, best practices...
 - E.g.: corporate governance codes
- And relevance of companies' **internal rules**
 - **Internal regulations**, bylaws, articles...
 - E.g.: internal privacy or ethical codes
- That's **corporate governance**, overall considered



European Company Law

- So what does “European” mean?
- At least two meanings:
 - **Geographic**
 - **Institutional**
- This makes it clear that we have two different (and sometimes overlaying) dimensions:
 - **Institutional ECL**
 - **Comparative CL**, where the different domestic solutions in MSs are compared



«Institutional» European CL

- Refers to the **direct intervention** of **European institution** in the **Member States (MS) Company Law**
- **Different means of action**; foundations in the TFEU (and principles in TEU)
- «**Incomplete**» **system**: ECL has not provisions regarding every profile of a «national» company law. For this reason...



«Geographic» European CL

- Each country, its own CL
 - **Comparative company law** is king
- Some **profiles are different**, even very different; some are similar, since the very concept of company
 - Let's think about the difference company/partnerships, and the recent Lithuanian simplified partnerships
- **Similarity** comes from three reasons:
 1. Common background
 2. Diffusion and/or transplant of legal models
 3. **Harmonisation**



Finally: ECL!

- CL is **not an exclusive competence** of EU; it is just a competence **shared with the MS**, usually in the macro-area of Internal Market
- Any initiative of the EU in the field is subject to **two basic principles** (besides conferral from Member States to the Union):
 1. **Proportionality**
 2. **Subsidiarity**



Art. 5.3 & .4 TEU

3. Under the principle of **subsidiarity**, in areas which do not fall within its exclusive competence, the Union shall act **only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level**, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

[...]

4. Under the principle of **proportionality**, the content and form of Union action **shall not exceed what is necessary to achieve the objectives** of the Treaties.

[...]



Basic principles in EU Law (1)

- Art. 26.1 & .2 TFEU

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

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



Basic principles in EU Law (2)

- Freedom to provide services

Art. 56 TFEU

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

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may extend the provisions of the Chapter to nationals of a third country who provide services and who are established within the Union.



Basic principles in EU Law (3)

- Freedom of establishment

Art. 49 TFEU

*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.*

*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*



Art. 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, for the purposes of this Chapter, **be treated in the same way as natural persons who are nationals** of Member States.*

*'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**.*



Key issues of Art. 54.2

- **Not only companies**, also firms, and even cooperatives
- Under **civil** or **commercial law**
- Governed by either **public** or **private law**
- **Save for no-profits.**
 - So, just profit companies & firms are considered, because they are supposed to pursue business, and thus economic, activities
 - Caution 1: no-profit entities could pursue economic activity as well
 - Therefore: exclusion is a political decision
 - Caution 2: what about hybrid/low-profit companies?



Corollary principle regarding capital

Art. 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** within the meaning of Article 54, without prejudice to the application of the other provisions of the Treaties.*

Art. 63.1 TFEU

*Within the framework of the provisions set out in this Chapter, **all restrictions on the movement of capital** between Member States and between Member States and third countries **shall be prohibited**.*



Critical issues of Art. 54

- When is a company an Italian company? Or French? Or German?
- It must be «...formed in accordance...» *AND* «having their registered office, central administration **or** principal place of business...»
- Cumulative? Alternative?
- The point is the...



Connecting factor (1)

- MS rules as for constitution: «formed in accordance»
- MS rules as for granting citizenship to a company, according its own rules of **Private International Law of companies**
- The two **mainstream theories** are:
 1. **Incorporation** theory
 2. **Real seat** theory



Connecting factor (2)

- **Incorporation theory:** the company belongs to (*i.e.: is governed by the law of*) the MS where it has been incorporated or has lawfully transferred its registered office ([UK,] Ireland, Netherland, Italy; preferred by ECJ – see *Überseering* case)
- **Real seat theory:** the company is governed by the law of the place where the central management and control is located (France, Germany, Hungary)
- Combinations are possible.



What is in concrete ECL's goal?

Art. 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**.



Art 50.2 TFEU (1)

2. The European Parliament, the Council and the Commission shall carry out the duties devolving upon them under the preceding provisions, in particular:

[...]

(c) by abolishing those administrative procedures and practices, whether resulting from national legislation or from agreements previously concluded between Member States, the maintenance of which would form an obstacle to freedom of establishment;



Art 50.2 TFEU (2)

[...]

(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;

[...]



In addition: Art. 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.*



So...

- Art. 50 is **ordinary** for **progressive abolition of restrictions**, and **Parliament and Council** work together, while...
- ...Art. 115 is for **extraordinary removal**, by the **Council alone**, of MS' provisions which directly affect the freedom of establishment (*principle*) or the functioning (*concrete*) of the internal market.



Is that all, folks?

NO!

By means of **Arts. 114** and **352 TFEU**, EU Institutions are also entitled to adopt **Regulations**, in order to **enact the objectives of art. 26** (Parliament and Council, art. 114), or any objective set out in the Treaties, «and the Treaties have not provided the necessary powers» (Just the Council, art. 352)





In addition to that...

...the **European Court of Justice** is entitled to judge over the **alleged failure, by a MS** «to fulfil an obligation under the Treaties» (art. 258 TFEU), called **by the EU Commission**, or **by any MS' court or tribunal** (art. 267 TFEU)

- The issue is the scope of application of ECJ Decisions, and the possibility to its extension to similar cases outside the judgment



Three pillars, three (joint?) actions

1. Directives: **Harmonisation**
2. Regulations: **Standardisation**
3. Decisions: **Interpretation**



The pillars and the ages

ECL's formation has not been uniform in its development.
There has been a «**golden age**» between 1965 and 1990...

...then a «**quasi stalemate**» in the 1990s...

...and an «**apparent recovery**» in the 2000s



An incomplete system

Again, **ECL does not draw** – and even cannot draw, due to the principle of subsidiarity – a **complete CL system**

European institutional interventions are «**spot-by-spot**», according to an original project, with many changes of mind, political oppositions, abandoned tasks, eventual amendments to original texts and so on...



It sounds like a crime series

- There are **murders**...
 - **Fifth** and **Ninth** draft Directives; **SPE** draft Regulation
- There are **hidden motivations**...
 - SUP draft Directive
- There is a **continuous fight for the power**...
 - All the Regulations, with **EU competences clashing with MS' ones**