



Liability limitation (1)

- **Universal** feature of company law
- «*Owner shielding*»...
 - Together with «entity shielding»...
 - ...a complete asset partitioning is created
- **Asset partitioning** enables a better allocation of risks in a company's different businesses
 - i.e.: I can decide to pursue a risky activity, without risking directly all my personal belongings
- [contractual limited liability, but NOT *tort* limited liability: e.g. directors' liability]



Liability limitation (2)

- Possible fraud to creditors
 - See 1-euro companies all over the EU
- A basic problem: **piercing (or lifting) the veil**
 - Hard definition: who must pay?
 - Shareholders/members/owners?
 - Directors?
 - ... or just the creditors?
 - Different approaches in the US/UK and civil law systems



Transferable shares

- Transferable \neq *freely* transferable
- Very much depending on the single actual case (closely held/closed or widely held/open); and
- The nature of the company (public or private – see below)
- The underlying idea: the transfer of the company shares' ownership (and therefore of the company's itself) should be made possible by law and makes the transfer of investment easier



Delegated management

- Shareholders (commonly) *are not* who manages the company, but **they appoint the directors**
- As **directors** are ≠ shareholders, they can **serve also interests other than those of appointing shareholders** (e.g. employees, minority shareholders...)
 - I am not discussing if this is good or bad... that's not a matter of morality...
- «The board is separated from the operational managers» of the company
 - Sub-delegation
- The board has usually more members (mutual monitoring)



Investor ownership

- Who is the Owner?
 - a) Who has the **right to control the company** (decision); and
 - b) Who **benefits of company's earnings** (subjective profit) (and who risks...)

This means that there is a **direct link**, at least as a default rule between the **investment** and the **power in/gain** from the company. A company's structure is less flexible than a partnership's one for preserving the investor ownership.



More about companies

- Publicly/widely held companies vs. Privately/closely held companies (*de facto*)
- Open vs. Closed companies (agreements)
- Public vs. Private companies (company forms)

- Key element is always the so-called **corporative structure**



European Company Law

What **purpose** for Company Law?

- **Common reliance** on **common rules** (for both mandatory and default rules) ► from a **substantive** and **judicial** point of view
- Foundation for **contractual provisions** (for both mandatory – limits – and **default** – options – rules)



Company Law(s)?

- **Regulatory competition**
 - In particular in the field of **private companies** (less harmonisation)
- Where is the **best law** for my purposes?
- Race to...
 - the **top**?
 - the **bottom**?
 - the **diversity**?



The function of Company Law

- **Maximise profit?** At which cost?
 - The entire topic of sustainability in Company Law, and therefore...
- **Serve whose interest?** Shareholders? Employees? Environment? The «society» as a whole?...
- The «**enlightened shareholders' value**»
 - See, e.g., Section 172 UK Companies Act 2006: “Duty to promote the success of the company”

(1) A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to—

 - a) the likely consequences of any decision in the long term,
 - b) the interests of the company's employees,



The function of Company Law

- c) the need to foster the company's business relationships with suppliers, customers and others,
- d) the impact of the company's operations on the community and the environment,
- e) the desirability of the company maintaining a reputation for high standards of business conduct, and
- f) the need to act fairly as between members of the company.

(2) Where or to the extent that the purposes of the company consist of or include purposes other than the benefit of its members, subsection (1) has effect as if the reference to promoting the success of the company for the benefit of its members were to achieving those purposes.

(3) The duty imposed by this section has effect subject to any enactment or rule of law requiring directors, in certain circumstances, to consider or act in the interests of creditors of the company."

- In any case: the intermediate goal is to **minimise conflicts** and **agency costs**



Agency costs?

- Yes: **agency costs** between the constituencies (different stakeholders) of the company:
 - Majority/minority shareholders
 - Shareholders/directors
 - Company/employees
 - ...

Company law's purpose is (should be?) – among the others – to **lower them**, in order to gain more **efficiency**



Company Law: its borders

- No-profit – Social enterprise Law (?)
 - Well, insofar it is enterprise...
- Association (private) Law (?)
- Cooperatives' Law (?)
- Capital Markets Law (?)
- Banking Law (?)
- Bankruptcy Law (?)
- Competition & IP Law (?)



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.