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**

Harmonisation

- By means of **Directives**
  - **Common standards** addressed to the MS, ***not*** common directly applicable **rules**
  - MS have the **option** to choose among the possible solutions offered by the Directive
  - Original project of **14 EC-CL** directives
  - **Differential scope of application** (Partnerships & Companies, Just companies, Just some company forms…)

The original project (1961-1964)

#	Subject	First adoption	Current version
1st	Disclosure, nullity, interest of third parties (acting on behalf of the company)	68/151/EEC	2017/1132/EU (2009/101/EC)
2nd	Capital formation and maintenance	77/91/EEC (1976)	2017/1132/EU (2012/30/EU)
3rd	Mergers of domestic companies	78/855/EEC	2017/1132/EU (2011/35/EU)
4th	Annual accounts	78/660/EEC	2013/34/EU
5th	Corporate governance	--	1972-1993-1991 †
6th	Divisions of domestic companies	82/991/EEC	2017/1132/EU (previously amended by Dir 2007/63/EC)
7th	Consolidated accounts	83/349/EEC	2013/34/EU

The original project (1961-1964)

#	Subject	First adoption	Current version
8th	Audit of annual and consolidated accounts	84/253/EEC	2006/43/EC (amended by dir 2014/56/EU) + Reg2014/537/EU
9th	Groups of companies	--	1974-1984 †
10th	Cross-border mergers	2005/56/EC	2017/1132/EU
11th	Branches	1989/666/EEC	2017/1132/EU
12th	Single members companies	89/667/EEC	2009/102/EC
~~13th~~	Takeover bids	2004/25/EC	=
~~14th~~	Cross-border transfer of registered office	--	2017/1132/EU (2019/2121/EU)

And beyond…

- **Online constitution** (Companies – mainly private – Directive 2019/1151/EU)
- **Prospectus** (Financial Markets, 2003/71/EC)
- **Admission to Stock Exchange Listing** (Financial Markets, 2001/34/EC)
- **Shareholders' rights in listed companies** (Financial Markets, SRD1 2007/36/EC, SRD2 2017/828/EU)
- **MiFiD** (Markets in Financial Instruments Directive (Financial Markets, 2004/39/EC -> 2014/63/EU + Reg. 600/2014/EU)

A couple of notes

- In the most recent directives, there is not the ordinal number anymore (e.g.: the so called 13th directive is not «officially» the 13th directive)

- The same for the amendments, or codified versions of directives that originally had the ordinal number (so for the First directive, or the Fourth and Seventh, or the Twelfth…)
  - The problem does not exist any longer for rules included in the codified directive

Major news from 2017 on

- First, Second, Third, Sixth, Tenth and Eleventh Directives have been **codified** in Directive (EU) 2017/1132 (June 14, 2017), hereinafter: CodDir
- **Digitalisation (in the establishment)**: Directive (EU) 2019/1151, amending CodDir
- **Cross-border conversion and division**; amendment to cross-border mergers: Directive (EU) 2019/2121, amending CodDir
- **SRD2** (2017/828/EU)
- **New initiatives on sustainability** (NFS in 2014, and under amendment; Corporate Sustainability due diligence proposal, February 2022)

Scope of application

Directive	Public companies	Private companies	Partnerships
~~1st~~ CODI	Yes	Yes	NO
~~2nd~~ CODI	Yes	NO	NO
~~3rd~~ CODI	Yes	NO	NO
4th – 7th	Yes	Yes	Yes – NO
~~6th~~ CODI	Yes	NO	NO
8th	depending	depending	depending
~~10th~~ CODI	Yes	Yes	NO
~~11th~~ CODI	Yes	Yes	NO
12th	Yes	Yes	NO
13th	Yes	NO	NO
Beyond	Yes (only listed)	NO	NO

This means that…

- **Top-down harmonisation** only works where a **directive** provides for that
- **Partnership** are basically **not harmonised**… but perhaps they do not need it
- **Private companies** are «freer» than public ones… but nothing prevents **bottom-up harmonisation**…
- To sum up: harmonisation is for many, but not for everyone!

Harmonised… but not the same!

Regulatory competition reigns over…

- Private companies
- Public companies as for…
  - **Minimum capital requirement** (just above EUR 25,000…)
  - **Structure** (one-tier/two-tier)
  - **Debentures**
  - **Lifting the corporate veil**
  - …

Who has interest in harmonisation?

- **Third parties** (disclosure)
- **Investors** (Capital markets [prospectus, MiFiD, Takeover bids, …], shareholders' rights, …)
- The **system as a whole** (auditors)

- **SMEs?**
  - The answer is blowing in the wind of Corporate governance, Groups, and so on with failed initiatives…

Harmonisation via Directives

- **Opt-in/opt-out**
- An original system?
  - The kingdom of comparative law in action
  - Pieces from different national experiences: **almost nothing comes out of the blue**

- Some kind of Frankenstein's monster, but, perhaps…

In general, thus...

- Harmonisation should be seen as a sort of **cherry picking** of the best (or most meaningful) **European experiences** in different Company Law areas

- With a view to **attain**[ing] **freedom of establishment** by removing domestic obstacles

As the system is incomplete…

…it deals just with **a few topics**; among the others:

- **Disclosure**
- **Validity vs. third parties in general** (nullity, representation)
- **Extraordinary operations** (mergers, divisions, in their disclosure meaning, and with a view to cross-border dimension)
- **Accountings** and **auditing** (disclosure, again)
- **Digitalisation** (but not always)

As the system is incomplete…

- **Legal capital & shares**
- **Branches** (disclosure, again and again)
- **Single member companies**
- **Corporate governance & shareholders' rights** in listed companies
- **Takeover bids**…

No agreement (yet...) for a few key issues

- Corporate governance
- Groups of companies
- Cross-border private company forms

Therefore, three pillars!

EU action in MS' company law is based on **three pillars**.

1. **Directives**
2. **Regulations**
3. **Decisions**

Therefore, three pillars!

Art. 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.

It looks quite easy, isn't it?

…but don't worry. It isn't.

For instance, on the one hand, **Regulations are not always directly self executive**;

on the other hand, **Directives could, sometimes, be directly applicable**;

and as for **Decisions**, one has to be patient…

…but they are the most meaningful part when it comes to the **interpretation of ECL**

The origins: the first directive

- Also called «disclosure directive» (DD)
  - But it does not deal with just disclosure
- Proposal: 1964; Adoption: 1968; Amendment (lastly): 2003; Consolidated versions: 2009 + 2012; **Codification 2017**
- Official number: **Directive 2017/1132/EU - CodDir (arts 7-12; 14-28; 161, 163, 165, annex 2)**
- Scope of application: **all the limited liability companies**
  - **i.e.: public and private companies**

Annex 2 CodDir (art. 1 DD)

- List of company forms, but…
- …what about if a MS introduces a new company form in the meanwhile? Automatic extension? Or not?
  - The case of French *SAS* and the Second Directive

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BLEUSE CATTEDRA JEAN MONNET
BUSINESS LAW IN THE EUROPEAN UNION AND SUSTAINABLE ECONOMY

Key topics of DD

Disclosure (Arts 14-28 CodDir [Arts 2-7 DD])

&

Validity (in order to protect third parties) (Arts 7-9 CodDir [8-10 DD]: validity of obligations; Arts 10-12 CodDir [11-13 DD]: nullity)

1) Nullity

- ECL only deals with **registered companies**
  - Before registration: just domestic law
- Very restricted list of grounds for nullity. Why?

Grounds for nullity

Art. 11(b) CodDir [Art. 12(b) DD]

The laws of the Member States may not provide for the nullity of companies otherwise than in accordance with the following provisions:

...

(b) nullity may be ordered only on the grounds:

(i) that no instrument of constitution was executed or that the rules of preventive control or the requisite legal formalities were not complied with;

(ii) that the objects of the company are unlawful or contrary to public policy;

(iii) that the instrument of constitution or the statutes do not state the name of the company, the amount of the individual subscriptions of capital, the total amount of the capital subscribed or the objects of the company;

(iv) of failure to comply with provisions of national law concerning the minimum amount of capital to be paid up;

(v) of the incapacity of all the founder members;

(vi) that, contrary to the national law governing the company, the number of founder members is less than two.

ICC Art. 2332

Nullità della società

Avvenuta l'iscrizione nel registro delle imprese, la nullità della società può essere pronunciata soltanto nei seguenti casi:

1) mancata stipulazione dell'atto costitutivo nella forma dell'atto pubblico;

2) illiceità dell'oggetto sociale;

3) mancanza nell'atto costitutivo di ogni indicazione riguardante la denominazione della società, o i conferimenti, o l'ammontare del capitale sociale o l'oggetto sociale.

FrCodComm Art. 235-1

La nullité d'une société ou d'un acte modifiant les statuts ne peut résulter que d'une disposition expresse du présent livre ou des lois qui régissent la nullité des contrats. **En ce qui concerne les sociétés à responsabilité limitée et les sociétés par actions, la nullité de la société ne peut résulter ni d'un vice de consentement ni de l'incapacité, à moins que celle-ci n'atteigne tous les associés fondateurs.** La nullité de la société ne peut non plus résulter des clauses prohibées par l'article 1844-1 du code civil.

Just a few notes:

- Subparagraph vi is obsolete (see SMC Directive)
- Nullity as exceptional measure: grounds restricted and not extensible
- The problem is in particular with the concept of «contrary to public policy» under subparagraph ii
  - *de iure* violation, not *de facto* violation, form over substance in this case, principle of proportionality

Declaration of nullity

Arts 11(a)+12 CodDir [Arts 12(a)+13 DD]

The laws of the Member States may not provide for the nullity of companies otherwise than in accordance with the following provisions:

(a) nullity must be ordered by decision of a court of law;

...

1. The question whether a decision of nullity pronounced by a court of law may be relied on as against third parties shall be governed by Article 16. Where the national law entitles a third party to challenge the decision, he may do so only within six months of public notice of the decision of the court being given.

2. Nullity shall entail the winding-up of the company, as may dissolution.

3. Nullity shall not of itself affect the validity of any commitments entered into by or with the company, without prejudice to the consequences of the company's being wound up.

4. The laws of each Member State may make provision for the consequences of nullity as between members of the company.

5. Holders of shares in the capital of a company shall remain obliged to pay up the capital agreed to be subscribed by them but which has not been paid up, to the extent that commitments entered into with creditors so require.

ICC Art. 2332

La dichiarazione di nullità non pregiudica l'efficacia degli atti compiuti in nome della società dopo l'iscrizione nel registro delle imprese.

I soci non sono liberati dall'obbligo di conferimento fino a quando non sono soddisfatti i creditori sociali.

La sentenza che dichiara la nullità nomina i liquidatori.

La nullità non può essere dichiarata quando la causa di essa è stata eliminata e di tale eliminazione è stata data pubblicità con iscrizione nel registro delle imprese.

Il dispositivo della sentenza che dichiara la nullità deve essere iscritto, a cura degli amministratori o dei liquidatori nominati ai sensi del quarto comma, nel registro delle imprese.

Key issues

- Court decision
- Just *ex nunc* effects
- Liquidation procedure (national laws)
- Shareholders not automatically free from the duty of contributions

2) Validity of obligations before registration

Art 7.2 CodDir [Art. art 8 DD]

2. If, before a company being formed has acquired legal personality, action has been carried out in its name and the company does not assume the obligations arising from such action, the persons who acted shall, without limit, be jointly and severally liable therefor, unless otherwise agreed.

ICC Art. 2331

Per le operazioni compiute in nome della società prima dell'iscrizione sono illimitatamente e solidalmente responsabili verso i terzi coloro che hanno agito. Sono altresì solidalmente e illimitatamente responsabili il socio unico fondatore e quelli tra i soci che nell'atto costitutivo o con atto separato hanno deciso, autorizzato o consentito il compimento dell'operazione.

Qualora successivamente all'iscrizione la società abbia approvato un'operazione prevista dal precedente comma, è responsabile anche la società ed essa è tenuta a rilevare coloro che hanno agito.

Key issues

- Before registration
- The problem of *Vorgesellschaft*
- In substance: in whose name the activity has been carried out? The future company? And existing pre-company?
- ECL simply sets the consequences, not the theoretical framework
- «unless otherwise agreed»: acts on behalf (not «in the name») of *Vorgesellschaft*, for instance.

3) Representation

- *Appointment* regulated by national laws
  - But, currently, the disqualification of directors is included (art. 13i)
- *Effects* harmonised by the DD
- For enhancing at the utmost third parties' (not other shareholders') *reliance* at a EU level
- Basic principle: *unrestricted representation power*
- MS can set both general and particular exceptions

Art 9.1 CodDir (Art. 10.1 DD)

*1. Acts done by the organs of the company shall be binding upon it **even if those acts are not within the objects of the company**, unless such acts exceed the powers that the law confers or allows to be conferred on those organs.*

However, Member States may provide that the company shall not be bound where such acts are outside the objects of the company, if it proves that the third party knew that the act was outside those objects or could not in view of the circumstances have been unaware of it. Disclosure of the statutes shall not of itself be sufficient proof thereof.

ICC, Art. 2384

Il potere di rappresentanza attribuito agli amministratori dallo statuto o dalla deliberazione di nomina è generale.

Key issues

- Even *ultra vires* activities are binding the company towards third parties (not the shareholders)
- Questionable under Italian Law (perhaps *ultra vires* activities are to be considered as voluntary restrictions, which can be opposed to third parties not in *bona fide*, see below)
- Possible in other legal system a general exception re. *ultra vires*, but simple articles' disclosure is not enough
- Possible exception (general) according to **MS Law** when the activity is out of general powers of representatives -> Third parties have to know it

Art. 9.2 & .3 CodDir (Art. 10.2 & .3 DD)

2. The limits on the powers of the organs of the company, arising under the statutes or from a decision of the competent organs, may not be relied on as against third parties, even if they have been disclosed.

3. If national law provides that authority to represent a company may, in derogation from the legal rules governing the subject, be conferred by the statutes on a single person or on several persons acting jointly, that law may provide that such a provision in the statutes may be relied on as against third parties on condition that it relates to the general power of representation; the question whether such a provision in the statutes can be relied on as against third parties shall be governed by Article 16.

ICC Art. 2384

Le limitazioni ai poteri degli amministratori che risultano dallo statuto o da una decisione degli organi competenti non sono opponibili ai terzi, anche se pubblicate, salvo che si provi che questi abbiano intenzionalmente agito a danno della società

Key issues

- Art. 9.2 CodDir [10(2) DD] does not deal with *exceptio doli*; that's why the Italian rule is acceptable (cases in which the third party was not in *bona fide* are not dealt with)
- Art. 9.3 CodDir [10(3) DD] : exceptional individual or joint representation, where allowed, can be relied on as against third parties under general disclosure conditions (see also art. 8 CodDir: «Completion of the formalities of disclosure of the particulars concerning the persons who, as an organ of the company, are authorised to represent it shall constitute a bar to any irregularity in their appointment being relied upon as against third parties unless the company proves that such third parties had knowledge thereof»)

4) Directors' disqualification (Art. 13i CodDir)

*1. **Member States shall ensure that they have rules on disqualification of directors**. Those rules shall include providing for the possibility **to take into account** any disqualification that is in force, or information relevant for disqualification, in another Member State. For the purpose of this Article, directors shall at least include the persons referred to in point (i) of Article 14(d).*

*2. Member States may require that **persons applying to become directors declare** whether they are **aware of any circumstances** which could lead to a disqualification **in the Member State concerned**.*

*Member States **may refuse** the appointment of a person as a director of a company where that person is **currently disqualified from acting as a director in another Member State**.*

*3. Member States shall ensure that they are **able to reply to a request** from another Member State for **information relevant for the disqualification of directors** under the law of the Member State replying to the request.*

4) Directors' disqualification (Art. 13i CodDir)

4. In order to reply to a request referred to in paragraph 3 of this Article, Member States shall at least make the ***necessary arrangements to ensure that they are able to provide without delay information*** *on whether a given person is disqualified or is recorded in any of their registers that contain information relevant for disqualification of directors, by means of the system referred to in Article 22. Member States may also exchange further information, such as on the period and grounds of disqualification.* ***Such exchange shall be governed by national law****.*

5. The Commission shall lay down ***detailed arrangements and technical details*** *for the exchange of the information referred to in paragraph 4 of this Article, by means of the implementing acts referred to in Article 24.*

6. Paragraphs 1 to 5 of this Article ***shall apply mutatis mutandis where a company files information concerning the appointment of a new director in the register referred to in Article 16****.*

4) Directors' disqualification (Art. 13i CodDir)

*7. The personal data of persons referred to in this Article shall be processed in accordance with Regulation (EU) 2016/679 and national law, in order to **enable the authority or the person or body mandated under national law to assess necessary information** relating to the disqualification of a person as a director, with a view to preventing fraudulent or other abusive behaviour and ensuring that all persons interacting with companies or branches are protected.*

*Member States shall ensure that the registers referred to in Article 16, authorities or persons or bodies mandated under national law to deal with any aspect of online procedures **do not store personal data transmitted for the purposes of this Article any longer than is necessary**, and in any event no longer than any personal data related to the formation of a company, the registration of a branch or a filing by a company or branch are stored.*

4) Directors' disqualification (Art. 13i CodDir)

Key issues:

- Substantive rules on disqualification: MS, but…
  - Include the *possibility* to **take into account** any *disqualification* "that is in force, or information relevant for disqualification" in another MS
  - Rules must be applied also at the appointment of a new director
- Director's statement on *the MS concerned*
  - The MS *may refuse* the appointment of a person disqualified in another MS
    - General basis? Differentiated basis?
      - And even if it is on a general basis: regulatory competition
    - Just *currently*?

4) Directors' disqualification (Art. 13i CodDir)

- Paragraph 3: may I disqualify in Italy a French citizen on the basis of a disqualification ground present in French Law?
  - And, even worse: a German citizen on the basis of a disqualification ground present in Poland?
- As of today, everything's up to MS's transposition
- Let's try to make this compatible with GDPR…