WERLAUFF

EU Company Law

Common business law of 28 states

2nd edition

DJØF Publishing

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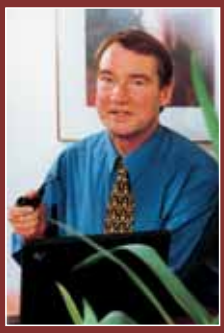
Common business law of 28 states

EU Company Law provides an account of a wide range of subjects of extreme importance to European businesses.

Among the subjects treated are: The company's right to operate in other countries on an equal footing with domestic enterprises. Federal company organisational forms: The economic interesting grouping and the SE company. Tax-free structural changes across borders. Formation and capital injection. Dividend and other capital outflows. General meetings, board of directors and management, including the issue of single-tier or two-tier company management. Subscription and representation rules. Liability in damages. Group relationships, including across borders. Employees and their position in regard to outsourcing. The annual report. Merger between companies of the same or different nationalities. Merger control. Division and business transfer. Voluntary and compulsory dissolution. Reconstruction.

The topics are treated in the book on a common European basis. It will make history when, in future, the company law of 28 European states will be modelled on the same basic rules: 15 old EU states, three EEA states, and up to 10 new EU states.



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Introduction

It will make history when, in the future, the company law of 28 states will be founded on the same basic principles in that the central rules of the EU company law will be binding on not only the old 15 EU states, but also the three EEA states and the 10 new EU Member States to be.

The company law of these many states is not uniform – nor is it required to be so – but all the main company rules will, or shall, be reflected in the company law of each individual state.

Add to this the importance to company law of the basic freedom rights in the EU Treaty, i.e. the right of establishment, the right to provide services, the free movement of labour, etc. These basic rights which derive from primary EU law are very important to the mobility of all companies. Further, the advent of common European company types in the form of the European Economic Interest grouping and – from 8 October 2004 – the European Company – will change the European company law scenario for ever.

In the 'old days' European law accounts of company law necessarily had to be comparative. The accounts would show a lot of features which were common from state to state but basically the emphasis was on the differences in the company law of the states. Now the emphasis will be on the common, cross-border features of company law and this is the main aim of the present account of the EU company law.

The book will focus on the cross- border mobility of companies in the form of access to establish themselves in other states and the requirement of equal treatment of foreign and domestic companies. Secondly, various company types are treated, including the cross-border partnership: the European Economic Interest Grouping, and, from 8 October 2004, the common European company: the SE. Subsequently, the common European tax rules securing the access to cross-border mobility via take-over and merger without releasing of tax, and the access to cross-border group-internal merger of reserves in the form of dividend, likewise without tax release.

Having focused on the EU law enterprise concept in contrast to the company law concept the book goes on to describe the events which will or may occur in a company's lifetime: Its formation, infusion of capital,

loss of capital, its issue of securities, the set of rules of the individual company in the form of articles and formation document, the company bodies and shareholders, mutual competence, external and internal relations of board and management, the general meeting, equal treatment of shareholders, including on a majority take-over, employees' rights on transfer of an enterprise from one company to another and on outsourcing of services from company to company, annual report and consolidated accounts, merger, division, merger control liquidation, bankruptcy and reconstruction. All of which is treated from a common European point of view which may seem a bold – but not impossible – venture.

I have endeavoured to ensure that the book does not provide the reader with a barren enumeration of existing and proposed EU provisions but really presents a comprehensive account of the law as it stands. Further the case law of the EC Court, the practice of the European Commission and of the courts of the individual states, especially German courts, is integrated naturally in the account which also goes for the common European legal literature .

Aalborg University, October 2002
www.business.auc.dk

Erik Werlauff

Abbreviations

AktG	(German) Aktiengesetz
BGB	(German) Bürgerliches Gesetzbuch
BGH	(German) Bundesgerichtshof
BverfG	(German) Bundesverfassungsgericht
CA	(Danish) Companies Act
CELEX	Data base of legal acts (communitatis europae lex)
CMLRev	Common Market Law Review
Código civil	(Spanish) civil code
DB	Der Betrieb
EBLR	European Business Law Review
EC	European Community
ECR	Compilation of ECJ decisions
ECHR	European Court of Human Rights
EEA	European Economic Area
EEC	European Economic Community
EEIG	European Economic Interest Grouping
EFTA	European Free Trade Area
EHRC	European Human Rights Convention
ELR	European Law Review
ERT	(Swedish) Europarättslig Tidskrift
ET	European Taxation
EU	European Union
EuZW	Europäische Zeitschrift für Wirtschaftsrecht
H	(Danish) Supreme court judgment or order
J	(Danish) Juristen (law periodical)
ICCLJ	International and Comparative Corporate Law Journal
L	(in OJ context) section L (legislatio)
NJW	(German) Neue Juristische Wochenschrift
NTS	Nordisk Tidsskrift for Selskabsret (Nordic company law periodical)

OECD	Organisation for Economic Cooperation and Development
OJ	Official Journal of the European Communities
OLG	(German) Oberlandesgericht
PCA	(Danish) Private Companies Act
Rabels	Rabels Zeitschrift für ausländisches und internationales Privatrecht
R & R	(Danish) Revision og Regnskabsvæsen (accountants' monthly magazine)
SvJT	(Swedish) Svensk Juristtidning
TfR	(Nordic) Tidsskrift for Rettsvitenskap (original language versions of decisions)
TfS	(Danish) Tidsskrift for skatter og afgifter (tax and duties journal)
UfR	(Danish) Ugeskrift for Retsvæsen (weekly law reports)
V	(Danish) High court decision (V signifies "Western Division")
ZGR	Zeitschrift für Gesellschafts- und Unternehmensrecht
ZIP	Zeitschrift für Wirtschaftsrecht
Ø	(Danish) High court decision (Ø signifies "Eastern Division")

CHAPTER 1

Legal Personality And Cross-border Mobility of Companies

1.1. Determining the concept of legal person

In the following, legal personality is deemed to exist when property is separated from its owner/s in such manner that it has acquired its own **legal capacity, capacity to make contracts** and accomplish other legal acts ('contractual capacity'), **capacity to be a party** in legal proceedings in its own right, and '**procedural capacity**'. Legal capacity may be defined as the power to hold rights and become liable to duties in one's own name without such right or duty lying with the owners of the property involved. Capacity to make contracts ('contractual capacity') is the power to use one's legal capacity in external dispositions aimed at such purpose. Since the legal person cannot write letters or speak its mind the acts undertaken must necessarily be through the agency of its organs or a certain amount of these. The organs are not the agents, properly speaking, of the legal person since one prerequisite of such agency is that the principal might have elected to perform the acts in question himself. The legal person does not have such choice. It is forced to act through its organs and can only express itself through such channel (or via an agent appointed by one of the organs) in the same way as a person of minority status has to express his mind through his guardian in e.g. contract law matters.

The capacity to be a party is the capacity to sue or be sued in legal proceedings before a court of law or arbitration court. The party in the case is the legal person and not the owners behind it, if any. Likewise, the judgment creditor or debtor is the legal person, not its owner. A judgment against the legal person is not a judgment against its owners. The procedural capacity is the power to dispose of one's party capacity. Thus, proce-

dural capacity is the procedural equivalent to the capacity to act in civil law, in the same way as capacity to act relates to party capacity, procedural capacity relates to party capacity. Hence, what was said above relating to the organ dispositions on behalf of the legal person is also true in a procedural context.

It is no mandatory requirement for legal personality that the **owners are not liable for its debts**. Although it was established above that such debts lie with the legal person and not with the owners this starting point does not prevent that the legal system a) endows such organisation for which the participants are liable with a legal personality, or conversely, b) allows the owners' liability to be limited to the property without endowing the latter with a legal personality of its own. One example of the a) category is the Regulation on European Economic Interest Groupings which allows each state to determine whether or not the grouping of undertakings is to rank as a legal person, cf. Art 1(3), whereas the requirement of the unlimited, joint and several liability for the grouping's debts is an absolute one, cf. Art 24(1). One example of b) is the Directive on Single-Member private limited liability companies which provides in Art 7 that states which do not recognise single entrepreneurs in company form shall recognise the concept of single member undertakings with limited liability.

1.2. A community law definition of legal personality

The 1st Company Directive contained provisions on the legal person's external acts and dealt with the issue when a legal person may exceptionally be declared invalid and thereby annulled but it failed, somewhat unaccountably, to define the concept of 'legal person'. Therefore we must address the Regulation on Economic Interest Groupings which deals with a personal company type and not a capital company, to find a definition in Community law of the concept. In Art 1(2) it is established that the grouping of undertakings from the date of registration will acquire the capacity **in its own name to have rights and obligations of all kinds (**i.e. legal capacity), **to make contracts or accomplish other legal acts** (i.e. the contractual capacity), and **to sue and be sued (**i.e. the capacity to be a party in legal proceedings). Combining these statements with Art 20 which provides that only the manager/s may represent the grouping in respect of dealings with third parties we have achieved an adequate

Community law definition of the legal capacity, contractual capacity, the capacity to be a party in legal proceedings, and the procedural capacity which are all inherent in the legal personality concept. That this Community law definition requires priority over an individual state's possibly deviating concepts is evident from Art 2(1) in the Regulation on groupings, which – although leaving the construction of memorandum and articles etc. to the domicil state – excludes from such *renvoi* matters relating to natural persons' 'status and capacity' (legal capacity), and capacity to contract or accomplish other legal acts as well as a legal person's 'status and (contractual) capacity'.

1.3. Company nationality determination and -change; international choice of law

The EC Treaty contains no sanction, whether by directive or regulation, for imposing on the Member States a duty to recognise personal or capital companies from the other Member States in a *company law* context (whereas the rules on establishment, which are discussed below, require the Member States to recognise *the freedom of establishment* of commercial legal persons to the same extent as natural person' freedom of establishment). On the other hand the Member States are under a duty to negotiate an agreement on several important issues, including mutual recognition of the companies mentioned in Art 48(2) (formerly Art 58), cf. Art 293, third dash? (formerly Art 220).

On this basis an **agreement on mutual recognition** of companies and legal persons was made as early as 1968. Since that Treaty cannot take force until it has been ratified by all EU states, cf. Art. 14, and since one Member State has declined such ratification it is not yet applicable law in the Member States. Nor is it likely to be.

Hence it *would seem* that the individual state's own private international rules will determine nationality of a company. 'Would seem' is used because this area is also governed by Community law which provides that the nationality determination of a company obtained by such application of private international law must not result in a failure to recognise the legal personality status of lawfully established companies from other EU or EEA countries and thereby provide the means to deny them access to establish themselves, cf. below. This presents a problem especially in