

Facilitating shareholders and companies: the utmost priority of EU Company Law?

Dr Konstantinos Sergakis
Senior Lecturer in Law
University of Glasgow

Summary

I. EU Company Law

- European Company Mobility Package

II. EU Capital Markets Law

- Sustainable finance

III. Corporate Governance

- ‘Stewardship’ and Shareholder Rights Directive II

EU objectives

- I. Competitiveness (attractiveness for companies)
- I. Incentivization of citizens to invest and engage (attractiveness for investors)
- II. Market efficiency/stability/integrity

EU approaches

- Shareholder primacy approach (mainly influenced by UK/US law)
- Stakeholder approach (workers rights, sustainability, building social businesses)
- Discursive approach (comply or explain, best principles): bridging the gap between the two and enabling stakeholders to increase their influence in the long term?

European Company Mobility Package

- **Digitalization**: give a digital opportunity to companies (attractiveness tool) => cross-border mobility/reduced costs and bureaucracy
- **Online registration**: welcome but exceptions at the national level regarding the type of company eligible to register online and the registration content = confusion/complexity
- Development of document and information submission standards to national (and interconnected) registers **fully online** (more work needed on the registers' operational framework, e.g AML example)
- **External** (procedural) aspects dealt with in detail but **internal** aspects have not been put forward (Fintech initiatives instead?)

European Company Mobility Package

- Cross-border operations: Initial promises
- new company law rules will make it easier for companies to merge, divide or move within the Single Market
- lack of harmonized rules for creditor/employee and shareholder protection and of simplified procedures
- safeguards and proper protection for stakeholders (in particular employees)

European Company Mobility Package

- Cross-border operations: Reality (draft report 21 August 2018)
- protection of employees: employee's involvement rights have been gradually weakened (due to the '*great diversity of rules and practices [that] should be respected*') and the emphasis upon information and consultation rights for employees needs to be tested in practice
- reinforcement of NCAs' role in cross-border conversions (but deleting the [debatable] requirement for an independent expert during conversion)
- lots of issues to be clarified, safeguards to be strengthened (CCI Paris critical view of short deadlines, complex/unattractive procedures and Commission's desire to prevent abuses)

Sustainable finance

- Commission Proposals (May 2018)

- a) uniform criteria for determining whether an economic activity is environmentally sustainable/process involving a multi-stakeholder platform to establish a unified EU classification system of sustainability based on a set of specific criteria.
- b) disclosure obligations in relation to the integration of ESG considerations into the investment and advisory process in a consistent manner across sectors.

CG codes and ‘Comply or explain’

- Softness/flexibility/discretionary space for dialogue
- Response rate very positive but inaction afterwards
- Investors care more about profits, less about compliance rates/explanations provided
- Nevertheless, the concept is becoming extremely popular in the US (hard law framework) given its discursive element.
- Same interest for CG codes (best practices that increase the level of investor confidence and attractiveness of companies and legal frameworks).

SRD II and Stewardship

- SRD II increases transparency in the investment chain (disclosure obligations for asset owners/managers and proxy advisors)
- ‘Legalization’ of stewardship
- UK Stewardship Code (origin and gradual influence across the globe): discursive approach with normative expectations
- Corporate Governance Codes: increased awareness of employee representation/presence in decision-making processes (UK example: UK CG Code/Wates Principles) => distant connection with cross-border conversions and employees role (reinforcing employees role in CG codes can prepare the ground for more intervention)

Conclusion

- European Company Mobility package: promising but challenges ahead
- Sustainable Finance and SRD II initiatives also potentially influential but it will ultimately depend on the interested parties to make use of the new framework
- Discursive approach very attractive for the future and has the capacity to re-balance the debate between shareholders and stakeholders
- Reliance upon market actors and stakeholders to use the available tools to rebalance the debate (unlikely to see this coming from the EU)