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Mauro Cappelletti · Monica Seccombe · Joseph Weiler

Volume 4

Legal Harmonization and the Business Enterprise

Corporate and Capital Market Law Harmonization Policy
in Europe and the U.S.A.

by
Richard M. Buxbaum and Klaus J. Hopt



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General Editors' Foreword

The Florence Integration Through Law Series is the product of a research project centered in the Law Department of the European University Institute, and as such it reflects the research interests of the Department: it is a contextual examination of European legal developments in comparative perspective. In the general introduction to the Series (published in Book One of Volume I), we explained fully the philosophy, methodology and scope of the Project. Here we wish merely to recapitulate some of the principal themes of special relevance to this Volume on Enterprise Law.

The European Legal Integration Project set out to examine the role of law in, and the legal impact of, integration in Europe, using the United States federal system as a comparative point of reference. The Project was conceived and executed in two parts. In Part One (published in Volume I entitled "Methods, Tools and Institutions"¹) a number of teams of American and European scholars examined a wide range of legal techniques and mechanisms for integration and undertook an overall general analysis of law and integration. The first book of Volume I ("A Political, Legal, and Economic Overview") establishes the comparative and interdisciplinary context, providing background studies on the political, legal and economic implications of integration in Europe and America and including studies on other federal systems (Australia, Canada, Germany and Switzerland) to add comparative perspective. The second book ("Political Organs, Integration Techniques, and Judicial Process") analyzes the pre- and post-normative stages, examining the decision-making and implementation problems, and the role of political techniques available in a federal or supranational context.

The third and final book of Volume I ("Forces and Potential for a European Identity") focusses on how the law can be harnessed to promote the governmental or integrational objectives of union. It isolates for consideration some substantive goals (foreign policy, free movement of goods and persons, human rights protection and legal education), in order to elucidate the ways in which law has been or can be used to promote substantive objectives. This approach is more fully developed in the studies in Part Two of the Project which deals in greater detail with substantive areas of federal/transnational policy and is open-ended. To date, in addition to the present volume on enterprise law, monographs have been written in the following four areas: environmental

¹ Published by Walter de Gruyter (Berlin/New York) in January 1986.

policy,² consumer protection,³ energy policy,⁴ and regional policy.⁵ It is hoped that further studies may be undertaken in the future.

No justification is needed for the choice of corporate law and capital market harmonization as a topic to be included among the five substantive studies. One of the great benefits the Common Market was to yield was to be the easing of transnational enterprise and entrepreneurship. Indeed, the United States was often cited as a model of a non-unitary legal order in which companies could nevertheless operate as if in a single market with all the advantages of size, and in which investors and creditors would receive federal protection. In fact the Community has often been accused of "pandering" to the interests of the business community to the exclusion of other societal sectors. The fact is that harmonization of enterprise law has proved to be a much greater task than was originally envisaged. Obstacles of a legal, political and economic nature have impeded the desired transformation, and at a deeper level the very philosophy and alleged gains have come under strict scrutiny.

The authors of this study capture the totality of the debate. The theoretical grounds of transnational enterprise law are re-examined and then confronted with the complex reality of the two legal orders. The conclusions, as the reader will discover, are often startling. Thus we find, to give but one example, that a principal objection to harmonization may be not so much that the substantive contents of a compromise directive are unacceptable, but the fact that once a measure is "Communitarized," the tortuous EC decision-making structure might consign it to almost automatic obsolescence given the difficulties in passing new amending legislation. Transnationalism might thus be impeded by the very success of the initial Community process.

Corporation law as a topic for legal analysis has, of course, already elicited a substantial amount of scholarly attention. Why then present this new examination? First and foremost is the value of a fresh analysis by the distinguished authors of this volume. But in addition, it is our belief that the Integration Project provided a special context for specific and unique insights. Most obvious is the comparative context: this study presents a tight comparative analysis of the European and American experiences. Through this comparative

² E. REHBINDER & R. STEWART, *Environmental Protection Policy* (Vol. 2 *Integration Through Law*) was published by Walter de Gruyter (Berlin/New York) in December 1985.

³ T. BOURGOIGNIE & D. TRUBEK, *Consumer Law, Common Markets and Federalism in Europe and the United States* (Vol. 3 *Integration Through Law*) was published by Walter de Gruyter (Berlin/New York) in December 1986.

⁴ T. DAINTITH & S. WILLIAMS, *The Legal Integration of Energy Markets* (Vol. 5 *Integration Through Law*) was published by Walter de Gruyter (Berlin/New York) in March 1987.

⁵ Y. MENY & B. DE WITTE, *Regionalism and Federalism: The Challenge of Regions in National and Transnational Politics* (Vol. 6 *Integration Through Law*) (forthcoming).

analysis we gain a better understanding not only of the problems associated with the specific subject of transnational enterprise law but also of the workings of the transnational/federal system of governance in general. There is as much to be learnt from this volume on the process of integration and its problems as there is to be learnt on the legal dimensions of corporate life and capital markets.

The Project has invited, however, more than the comparative contribution. The Florence Integration Through Law Series is dedicated to the concept of Law in Context: the examination of legal problems in their political, economic and social setting. There has been much pontification in recent years about the value of interdisciplinarity. Implementation of this value, however, often falls short of much hallowed theoretical expectations. In this regard our claims were modest: We did not ask our contributors to bring the full scientific paraphernalia of, say economics or political science to bear on their subject; we simply asked that the legal analysis be situated in, and be sensitive to, the implications of the socio-economic and political context. The present volume is, in our view, an extraordinarily successful example of this approach.

The European Integration Project follows on from an earlier wide-ranging research project which was carried out at the European University Institute – the Florence Access-to-Justice Project. Access to Justice was not only concerned with an examination and, indeed, extension of the procedural and institutional mechanisms for the vindication of rights in contemporary society. It was an approach which sought to emphasize that in legal study an analysis of the normative content of legal rules and policies – while still central – can give only a partial picture of the function and shortcomings of the law in its societal context. Normative analysis is but one layer of analysis: the effective (or otherwise) reach of the law, its implementation and enforcement, its accessibility to subjects to whom it is addressed as a source of rights and duties, is a second no less important layer. This approach has been a constant guideline to all contributions to the European Integration Project.

Problems of implementation and enforcement are notorious in the field of multinational corporations. They are aggravated in the European transnational system which has its own inherent difficulties of supervision and compliance – though this context offers the only real hope of coming to grips with the multinational corporate body. This study deals in depth with this dimension, and is one of the first of its kind in the European context.

If the Access-to-Justice philosophy postulated the addition of this post-normative layer in the analysis of law, the institutional and procedural character of the Integration Project postulated the addition of yet another layer – a pre-normative layer. Both in the first general methodological part of the Project and in its second substantive part we have given considerable attention to the decision-making process by and through which norms emerge. The necessity of this addition is so clear as to obviate any lengthy explanation. Not only is decision-making an essential component in the analysis of the system as a

whole, but it also gives, particularly in the context of the European transnational concordance of interests, an insight into the normative outcome and, as explained throughout the Project, into the very problems of implementation, application and enforcement. All studies in Part Two of the Project, have adopted what one may call a "total" approach to legal analysis. Certainly the normative, "black letter" dimension of the law is explored; but this normative analysis is sandwiched between the pre- and post-normative phase. The volume explores fully the process of policy-making, the difficulty it encounters and the political context against which normative compromises are reached.

The Integration Through Law Series represents a collective effort over a long period of time. At its inception we believed that the first methodological part of the Project would be the setting against which the subsequent substantive parts, such as this study on corporate law and capital markets would be written. Things often do not turn out as they were planned. The two parts of the project in fact evolved simultaneously, and while the Part Two studies undoubtedly did rely on the general methodological background studies of Part One, the studies in Part One equally drew upon the analysis contained in the concrete substantive studies of Part Two. In this process of cross-fertilization Professors Buxbaum and Hopt played a much appreciated part. In particular their insights into the economic dimensions of transnational processes were instructive to many other contributors. Their collegiality and cooperation with the editors significantly facilitated our task. We are truly grateful to them.

Florence, December 1986

Mauro Cappelletti
Monica Seccombe
Joseph Weiler

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List of Abbreviations

AcP	Archiv für die civilistische Praxis
ADHGB	Allgemeines Deutsches Handelsgesetzbuch
AfA	Absetzung für Abnutzungen
AG	Aktiengesellschaft, Die Aktiengesellschaft
AJIL	American Journal of International Law
AktG	Gesetz über Aktiengesellschaften und Kommanditgesellschaften auf Aktien
Am. Bar Found. Res. J.	American Bar Foundation Research Journal
Am. J. Comp. L.	American Journal of Comparative Law
Am. J. Leg. Hist.	American Journal of Legal History
BB	Der Betriebs-Berater
BFH	Bundesfinanzhof
BG	Bundesgerichtshof
BGBI.	Bundesgesetzblatt
BGH	Bundesgerichtshof
Bost. Coll. L. Rev.	Boston College Law Review
BTDrucks.	Drucksachen des Deutschen Bundestages
Bull. EC	Bulletin of the European Communities
Bus. Hist. Rev.	Business History Review
Bus. Law.	Business Lawyer
BVerwG	Bundesverwaltungsgericht
Cal. L. Rev.	California Law Review
Ch.	Chapter
C.M.L.R.	Common Market Law Reports
C.M.L. Rev.	Common Market Law Review
Colum. L. Rev.	Columbia Law Review
Comp. L. Yearbook	Comparative Law Yearbook
Cong.	Congress
Conn. Bar J.	Connecticut Bar Journal
Const.	Constitution
Corp. L. Rev.	Corporation Law Review
DB	Der Betrieb
DBW	Die Betriebswirtschaft
Doc. COM	Commission Document(EC)
EC	European Community/Communities
E.C.R.	Reports of the European Court of Justice
Ecol. L. Q.	Ecology Law Quarterly
EEC	European Economic Community
EUI	European University Institute

EuR	Europarecht
Eur. L. Rev.	European Law Review
F.2d	Federal Reporter, Second Series
F. Supp.	Federal Supplement
GebrMG	Gebrauchsmustergesetz
Geo. L. J.	Georgetown Law Journal
Giur. comm.	Giurisprudenza commerciale
GmbH	Gesellschaft mit beschränkter Haftung
GmbHG	Gesetz betreffend die GmbH
GmbH-Rdsch.	Rundschau für GmbH
GRUR	Gewerblicher Rechtsschutz und Urheberrecht
GWB	Gesetz gegen Wettbewerbsbeschränkungen [Kartellgesetz]
Harv. J. Legis.	Harvard Journal on Legislation
Harv. L. Rev.	Harvard Law Review
HGB	Handelsgesetzbuch
H.R.	House of Representatives (US)
I.C.L.Q.	International & Comparative Law Quarterly
Int'l Enc. Comp. L.	International Encyclopaedia of Comparative Law
Int'l Leg. Materials	International Legal Materials
J. Am. Hist.	Journal of American History
J.C.M. Stud.	Journal of Common Market Studies
J. Comp. Bus. & Cap. Mkt. L.	Journal of Comparative Business & Capital Market Law
J. Comp. Corp. L. & Sec. Reg.	Journal of Comparative Corporation Law & Securities Regulation
J. Econ. Hist.	Journal of Economic History
J. Econ. Lit.	Journal of Economic Literature
J. Int'l Bus. L.	Journal of International Business Law
J. Law, Econ. & Org.	Journal of Law, Economics & Organization
J. Leg. Studies	Journal of Legal Studies
J.O.	Journal Officiel
JöR n.f.	Jahrbuch des Öffentlichen Rechts der Gegen- wart, neue Folge
J. World Trade L.	Journal of World Trade Law
Law & Contemp. Prob.	Law & Contemporary Problems
Law & Soc'y Rev.	Law & Society Review
Law & Policy Int'l Bus	Law & Policy in International Business
L.Q.R.	Law Quarterly Review
Mich. L. Rev.	Michigan Law Review
Minn. L. Rev.	Minnesota Law Review
MitbestG	Gesetz über die Mitbestimmung der Arbeitnehmer
Mod. L. Rev.	Modern Law Review
N.C.L. Rev.	North Carolina Law Review
Netherlands Int'l L. Rev.	Netherlands International Law Review

NJW	Neue Juristische Wochenschrift
Notre Dame Law.	Notre Dame Lawyer
N.Y.U. L. Rev.	New York University Law Review
O.J.	Official Journal (of the EC unless otherwise stated)
Ore. L. Rev.	Oregon Law Review
Oxf. J. Leg. Studies	Oxford Journal of Legal Studies
P2d	Pacific Reporter, Second Series
Pas. Belge	Pasicrisie Belge
PatG	Patentgesetz
Pub. Ad. Rev.	Public Administration Review
Pub. L.	Public Law
Q.B.	Queen's Bench, Law Reports (England)
RabelsZ	Rabels Zeitschrift für ausländisches und internationales Privatrecht
Rev. crit. droit int'l privé	Revue critique de droit international privé
Rev. soc.	Revue des sociétés
Rev. trim. droit comm. et droit écon.	Revue trimestrielle de droit commercial et de droit économique
RGBL.	Reichsgesetzblatt
RG	Reichsgericht
RGZ	Entscheidungen des Reichsgerichts in Zivilsachen
R.I.D.C.	Revue internationale de droit comparé
Riv. soc.	Rivista delle società
RIW/AWD	Recht der Internationalen Wirtschaft/Außenwirtschaftsdienst des Betriebs-Beraters
R.T.D.E.	Revue trimestrielle de droit européen
S. Ct.	Supreme Court Reporter
SEC	Securities & Exchange Commission
Sec. Reg. L.J.	Securities Regulation Law Journal
Sess.	Session
Stan. L. Rev.	Stanford Law Review
Sup. Ct. Rev.	Supreme Court Review
Supp.	Supplement
U. Chi. L. Rev.	University of Chicago Law Review
UCLA L. Rev.	University of California, Los Angeles Law Review
U. Pa. L. Rev.	University of Pennsylvania Law Review
U.S.	United States Supreme Court Reports
U.S.C.(A.)	United States Code (Annotated)
UWG	Gesetz gegen den unlauteren Wettbewerb
Va. L. Rev.	Virginia Law Review
WPg	Die Wirtschaftsprüfung
Wis. L. Rev.	Wisconsin Law Review
WM	Zeitschrift für Wirtschafts- und Bankrecht (Wertpapier-Mitteilungen)

Wm. & Mary L. Rev.	William and Mary Law Review
WRP	Wettbewerb in Recht und Praxis
WuR	Wirtschaft und Recht
WZG	Warenzeichengesetz
Yale L. J.	Yale Law Journal
ZaöRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht
ZfA	Zeitschrift für Arbeitsrecht
ZGesKW	Zeitschrift für das gesamte Kreditwesen
ZGR	Zeitschrift für Unternehmens- und Gesell- schaftsrecht
ZHR	Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht
ZKW	Zeitschrift für das gesamte Kreditwesen
ZRG Germ. Abt.	Zeitschrift der Savigny-Stiftung für Rechtsge- schichte, Germanistische Abteilung
ZVerglRW	Zeitschrift für vergleichende Rechtswissenschaft
ZZP	Zeitschrift für Zivilprozeß

Chapter One

Introduction: Models of Inquiry

This is a study of legal integration in the field of company law, with some extension into the larger field of enterprise law. It begins, as do parallel substantive field studies in the "Integration Through Law" Series, with the search for principled criteria providing an appropriate guide to the division of all three governmental powers – legislative, judicial and executive – between federal (Community) and state (Member State) governments, insofar as this division of powers affects the latter's respective roles in the development and implementation of company or enterprise law. The description and critical evaluation of the American struggle to develop those criteria will reveal primarily the results of two hundred years of political developments; the European study will reveal more the result of the current, and somewhat more explicit, bureaucratic as well as political struggle over this agenda.

Scholars who look or hope for rational decision-making criteria are victims of the illusion that principle and motive are synonyms. Nevertheless, and whether one focuses on the American or on the European experience, a first effort to develop rational criteria for that jurisdictional purpose is essential.

I. The Search for a Rational Division of Powers

This search implies a need for data and for models. The review of American and European experience which follows reveals the prevalence of the simple criteria of enterprise size and corporate form as determinants for state versus federal location of company law, but suggests little in the way of underlying theories or reasons for those choices. The potentially interesting theories about the division of powers which do emerge are mainly general in character and not specific to corporate or enterprise law. Two that are reasonably specific, one prescriptive and one predictive, are elaborated in some detail below and used in the substantive chapters that follow. Others, more general in nature, are more sketchily introduced; their use in the substantive chapters is more in the way of provocative illumination than as systematic explanations or hypotheses.

A. Quantitative Criteria

The following chapters reflect the considerable attention which has been paid in both legal systems to the identification of appropriate criteria by which to distinguish enterprise activity safely left to local regulation from enterprise activity which it is necessary to subject to federal, or in European terms to Community level, regulation. Questions of corporate size, and especially operational definitions of size appropriate to the various regulatory purposes, have occupied legislatures on both sides of the Atlantic for some time. It is theoretically intriguing and practically convenient to use such criteria to establish the division of legislative competence over corporations both at the state/federal and at the Member State/Community level in each set of jurisdictions. Certainly the American experience with investor protection regulation suggests such a correlation and, in a yet different sense, the European debates about the disclosure of enterprise information and the imposition of labor codetermination requirements confirm this focus on size-related criteria as the jurisdictional dividing line.

Nevertheless, this approach has both practical and theoretical inadequacies. Simply from an institutional perspective the issue, what specific size should trigger jurisdictional consequences, cannot be answered in principle but becomes enmeshed in expediency, political bargaining and administrative expertise. At the least, these are all problems which disable the courts from providing leadership in evolving appropriate rules and, by the same token, mandate the involvement of legislative institutions. The very existence of the latter at this stage of the European Community's development, let alone their ability, in terms of political legitimacy, to generate and install such norms, is still precarious. The evidence of the last decade concerning the struggle over company law directives in these sensitive fields demonstrates the problem,¹ at least as to the Council of Ministers, and indirectly even as to the European Parliament.

Perhaps even more significant is the functional problem: To what end is a size criterion desirable?² The elements of size relevant to investor protection relate primarily to dispersal of share ownership; the elements primarily relevant to codetermination concern the number of employees; whereas the elements relevant to antitrust concerns are totally external and bear more on

¹ See SCHNEEBAUM, "The Company Law Harmonization Program of the European Community," 14 *Law & Policy Int'l Bus.* 293 (1982); TIMMERMANS, "Die europäische Rechtsangleichung im Gesellschaftsrecht, Eine integrations- und rechtspolitische Analyse," 48 *RabelsZ* 1 (1984). For the history to 1970, see the definitive study of E. STEIN, *Harmonization of European Company Laws* (Indianapolis 1971).

² See on this issue R. BUXBAUM, "The Formation of Marketable Share Companies," in *Int'l Enc. Comp. L.*, Vol. XIII, *Business and Private Organizations*, ch. 3 (A. Conard ed., Tübingen n.d. [1974]).