

EU Ordinary Sources of Law for EU Capital Markets: The Right of Establishment

▶ Treaties

- Treaties of Rome
 - (EEC and Euratom)
 - Directive on securities admitted to official stock exchange listing; Directive on the requirements for the drawing up, scrutiny and distribution of the listing and Directive on information to be published were all based on [art. 54 \(3\) \(g\)](#) and art. 100 of the EEC Treaty (minimum harmonisation)
- Now, art. 50 (2) (g) TFEU («The European Parliament, the Council and the Commission shall carry out the duties devolving upon them under the preceding provisions, in particular: 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») and art. 114 TFEU
 - See PD, TD and Takeover Directive (TOD)

EU Ordinary Sources of Law for EU Capital Markets: Mutual Recognition

- ▶ Art. 53 (1) TFEU: «In order to make it easier for persons to take up and pursue activities as self-employed persons, the European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure, issue directives for the mutual recognition of diplomas, certificates and other evidence of formal qualifications and for the coordination of the provisions laid down by law, regulation or administrative action in Member States concerning the taking-up and pursuit of activities as self-employed persons»
 - See Mifid Directive

EU Ordinary Sources of Law for EU Capital Markets: Internal Market

- ▶ Art. 114(1) TFEU: «Save where otherwise provided in the Treaties, the following provisions shall apply for the achievement of the objectives set out in Article 26. The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market»
 - See MAD, PD, TD Directive and CRA Regulation

EU Legislative Instruments

- ▶ Art. 288 (1) 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».

Regulations

- ▶ In capital markets law, regulations do not have so far played much of a role
 - CRA, Short Selling, OTC
- ▶ They are addressed to individuals
- ▶ They are aimed at a full unification of the national laws

Directives

- They fit more «smoothly» into national laws
- They may contain precise and detailed provisions depriving the Member States of the possibility of choice of form and methods such as for capital markets laws
 - Only the provisions on enforcement in all four framework directives remain imprecise enough to leave the national legislatures with a large margin of appreciation
- Directives are addressed to Member States
- Direct effect
 - Generally, directives do not have it
 - ECJ: they can have it if they have not been implemented by the transposition date but not for capital markets law because their aim is not to convey rights to the investors (national legislation)