Tampere University

SIINA RASKULLA

European Constitution of Corporations

Legal Personhood, Legal Powers & Legal Governance of Corporate Entities in the European Union

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ACADEMIC DISSERTATION
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I dedicate this research to my late *Father,* with whom I shared a passion for science.

Thank you to my family, friends and colleagues who have supported me throughout the process.

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This research began during a period of economic crisis. It was also a personally challenging time for a new university graduate. While interested in doing a PhD, I planned to acquire work experience and find a topic for research from that experience. However, the economic crisis proved difficult time to start an expert career path, which I had worked so hard for. Therefore, I submitted a plan for much more theoretically oriented research than I had initially intended. The research topic did not stem from work experience but from personal experiences. This research is an attempt to understand the world around me and alleviate the feeling of disillusionment. Ironically, it comes to a conclusion during new crises, demonstrating how my understanding of 'normal' has been undoubtedly naïve.

The process itself reflects the writer: A keen reader with a broad scope of interests, but unenviably bad with prioritisation and without a sense of proportion. Therefore, many people deserve thanks for aiding me over the finishing line—too many to be named here. Those that are to be named are my doctoral supervisors Professor Jukka Viljanen from Tampere University and Docent Riku Neuvonen from the University of Helsinki, as well as Docent Pauli Rautiainen from the University of Eastern Finland; the reviewers Professor Harri Kalimo from the University of Eastern Finland and Vrije Universiteit Brussel and Research Fellow Fernando Losada from the University of Helsinki; the evaluation board; and finally, the esteemed opponent Professor Jukka Mähönen from the University of Helsinki.

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In Tampere, 26 April 2022.

Siina Raskulla

ABSTRACT

The financial and economic crisis of 2008−2014 raised many questions about the role of corporations in European society. This research studies the European Union's response to the crisis and its impact on the legal powers and legal relations of corporate entities. It seeks to increase our understanding of the nature of corporations as legal entities and the development of their societal role during the crisis period.

A model of corporate legal personhood recognising the extent and limits of corporate legal power has been lacking from the current EU legal debate. The research aims to elucidate the role and powers of corporations as legal entities and provide preliminary models for further discussion and development. The research formulates a hybrid model of corporate legal personhood. The hybrid model combines artificial, aggregate and real entity models. For the study of corporate legal relations, the research introduces a reviewed Hohfeldian typology of legal powers and legal relations. The typology reviewed recognises the trilateral nature of all formal relations recognised by the State, providing a more accurate description of also contractual relations between private law entities.

The research systematises EU primary legislation and general principles. It systematises the legal powers of private law entities in general and corporate entities in particular in the framework of the European Union's primary legislation. It then analyses the legal powers applying the reviewed Hohfeldian typology. The systematisation produces yields seven categories of legal rights and liberties and three sources of legal duties recognised by the EU. It is argued that statutory legislation recognising the corporate entity as an autonomous entity adds a surplus of legal personhood. The liberties and rights of CEs are limited to those necessary for their economic function in society. The research then recognised key principles of legal governance of private law entities generally and corporate entities in particular. Together with the systematisation of corporate legal powers, these principles constitute the four principles of legal governance of CEs. The liberties and rights of CEs can be intervened to any efficient measures to achieve Union objectives or to protect general interests recognised by the Union or promote fundamental non-market liberties and rights of natural persons.

To recognise the key variables that determine the legal status of corporate entities, the research studies the impact of crisis measures on the legal powers and legal relations of corporate entities. It covers relevant regulatory measures adopted between 2008 and 2014 and early 2015. The analysis of these measures demonstrates that ensuring the proper functioning of the financial and banking sector required entailed establishing a robust regulatory framework. At the same time, responses to the social challenges posed and perpetuated by the crisis were pursued primarily through markets or market-like mechanisms. To enhance the proper functioning of these mechanisms, the EU adopted regulation enhancing corporate transparency, protecting weaker contractual parties, and aiming at more efficient enforcement of competition.

According to the research, the key objectives of the measures adopted were to ensure economic recovery and growth in the prevailing conditions while also ensuring efficient use of pubic resources and financial sustainability. The majority of changes in corporate legal power are traceable to changes in extrajudicial variables, such as changed economic conditions and their impact on the costs and benefits created by business activities. In contrast to judicial factors, extrajudicial variables have been carefully assessed and balanced, highlighting their significance in determining the legal powers and legal relations of corporate entities.

The discussion recognises the dynamic nature of EU law. It connects this regulatory pendulum with the nature and function of the European Union as an intergovernmental organisation, aiming to create added value for Europeans. The discussion also recognises differences in approaches when comparing the EU legislator and the Court of Justice of the European Union. While the research at hand cannot solve policy issues, it provides a common terminology for future discussion.

Keywords: European Union, Treaty on European Union, Treaty on the Functioning of the European Union, company law, corporate social responsibility

TIIVISTELMÄ

Vuosien 2008−2014 Euroopan finanssi- ja talouskriisi nosti esille kysymyksiä yritysten yhteiskunnallisesta roolista. Tämä tutkimus tarkastelee Euroopan unionin oikeudellisia kriisitoimenpiteitä ja niiden vaikutuksia yrityksiin. Tutkimus pyrkii luomaan kokonaiskuvaa yrityksistä oikeushenkilöinä ja yritysten yhteiskunnallisesta roolista tarkastelemalla kriisiaikana tapahtuneita muutoksia.

Eurooppalaisesta yhtiöoikeudellisesta tutkimuksesta puuttuu teoreettinen malli yrityksistä oikeushenkilöinä, malli, joka tunnistaisi yritysten vallan laajuuden ja sen rajat. Tämä tutkimus tarjoaa alustavan mallin yritysten oikeushenkilöllisyydestä jatkokeskustelua ja -kehitystä varten. Tavoitteena on kehittää EU-oikeuteen soveltuva malli yrityksistä oikeushenkilöinä, analysoida kriisitoimenpiteiden oikeudellisia vaikutuksia yritysten näkökulmasta, ja tunnistaa keskeiset yritysten oikeudellisen vallan määrittelyn kannalta keskeiset muuttujat.

Tutkimus kehittää hybridimallin yritysten oikeushenkilöllisyydestä. Hybridimalli yhdistää kolmea aiemmin kirjallisuudessa käytettyö mallia. Tutkiakseen yritysten oikeudellista valtaa, oikeussuhteita ja niissä tapahtuneita muutoksia, tutkimus esittelee myös revisioidun version Hohfeldin typologiasta. Revisioitu typologia tunnistaa esimerkiksi horisontaalisten sopimussuhteiden kolmitahoiden luonteen, jossa valtio viime kädessä turvaa sopimusvelvoitteiden noudattamisen.

Tutkimus tunnistaa yksityisten oikeushenkilöiden ja erityisesti yritysten oikeudellisen vallan perusteet systematisoimalla EU:n primaarioikeutta ja yleisiä oikeusperiaatteita. Tutkimus argumentoi, että tunnistamalla yritykset autonomiseksi oikeushenkilöiksi, luodaan oikeushenkilöllisyyden ylijäämä. Yritysten oikeudellinen valta rajautuu niihin vapauksiin ja oikeuksiin joita se tarvitsee yhteiskunnallisen tarkoituksensa toteuttamiseksi. Sen vapauksiin ja oikeuksiin autonomisena oikeushenkilönä voidaan puuttua teoriassa missä määrin tahansa EU:n tavoitteiden edistämiseksi, yleisen edun turvaamiseksi tai luonnollisten henkilöiden perusoikeuksien suojelemiseksi.

Tutkimus analysoi havaintoja soveltaen revisioitua typologiaa tuottaen seitsemän eri oikeuksien kategoriaa, sekä kolme oikeudellisten velvoitteiden lähdettä. Tämän jälkeen tutkimus muotoilee ensin yksityisten oikeushenkilöiden oikeudellisen hallinnan yleiset oikeusperiaatteet ja sen jälkeen yritysten oikeudellisen hallinnan

yleiset periaatteet. Se tunnistaa Euroopan unioin peruskirjoihin kirjoitetut staattiset ja dynaamiset periaatteet sekä niiden merkityksen yritysten oikeudellisessa hallinnalla, erityisesti Euroopan kilpailullisen sosiaalisen markkinatalouden periaatteiden keskeisen roolin.

Tätä hallintaa hahmotellaan tarkastelemalla oikeudellisia kriisitoimenpiteitä. Tutkimus tarkastelee vuosien 2008–2014 aikana sekä alkuvuonna 2015 omaksuttuja oikeudellisia toimenpiteitä, lakiesityksiä ja lakeja, sekä niiden taustatöitä. Toimenpiteiden analysointi osoittaa, miten finanssi- ja pankkisektorin toiminnan turvaamiseksi omaksuttiin normeja ja niitä tukevia sanktioita. Samanaikaisesti, kriisin sosiaalisiin vaikutuksiin vastattiin pääasiassa markkinoiden tai markkinoiden kaltaisten mekanismien avulla. Näiden mekanismien kehittämiseksi omaksuttiin sääntelyä joka pyrki vahvistamaan liiketoiminnan läpinäkyvyyttä, heikompien osapuolien suojaa ja kilpailua. Toimenpiteiden tavoitteena oli varmistaa talouden toipuminen ja talouskasvu, sekä turvata julkisten varojen tehokas käyttö ja taloudellinen vakaus. Suurin osa muutoksista yritysten oikeudellisessa asemassa onkin johdettavissa muutoksista ulkoisissa muuttujissa, kuten taloudellisen tilanteen muutoksesta ja sen vaikutuksista yritystoiminnan tuottamiin yhteiskunnallisiin hyötyihin ja haittoihin. Lakien esitöissä ulkojuridisia muuttujia on tarkasteltu yksityiskohtaisesti ja lainsäädännön kustannuksia ja hyötyjä punnittu tarkkaan. Juridisten muuttujien tarkastelu on pääosin pinnallisempaa.

Keskusteluluvussa tarkastellaan lähemmin EU-oikeuden dynaamista luonnetta, ja kytketään siinä havaitut heilurimaiset liikkeet Euroopan unionin toimenkuvaan ja tehtävään. Keskusteluluvussa tunnistetaan myös EU-lainsäätäjän ja tuomioistuimen paikoin hyvin erilaiset lähestymistavat joiden arvioidaan vaikuttavan kielteisesti oikeusjärjestelmän selkeyteen, yhtenäisyyteen ja johdonmukaisuuteen. Tutkimuksen ollessa teoreettisesti painottunut, se ei tuota suosituksia tilanteen ratkaisemiseksi. Tutkimuksen tuottama oikeudellinen terminologia mahdollistaa kuitenkin keskustelun käymisen siten, että peruskäsitteistä on olemassa yhteisymmärrys.

Avainsanat: Euroopan unioni, Sopimus Euroopan unionista, Sopimus Euroopan unionin toiminnasta, yhtiöoikeus, yritysten sosiaalinen vastuu

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ABBREVIATIONS

ADR	Alternative dispute resolution
AKL	*Laki avoimesta yhtiöstä ja kommandiittiyhtiöstä* (Partnerships Act) 389/1988
AQR	Asset Quality Review
B2C	Business-to-consumer
BI	Behavioural Insight
BFR	Bank Resolution Funds
BRRD	Bank Recovery and Resolution Directive
CBCR	Country-by-Country Report Mechanism
CE	Corporate entity
CF	Cohesion Fund
CFR	European Charter of Fundamental Rights
CJEU	Court of Justice of the European Union (the Court of Justice and the General Court of the European Union)
CSR	Corporate social responsibility
EAFRD	European agricultural fund for rural development
EBA	European Banking Authority
EC	European Community
EC	European Council
ECB	European Central Bank
ECOFIN	Economic and Financial Affairs Council
ECSB	European System of Central Banks
ECSME	European Competitive Social Market Economy
ECtHR	European Court of Human Rights
EEC	European Economic Community (1)
	Treaty establishing the European Economic Community (2)
EIOPA	European Insurance and Occupational Pensions Auhtority
EMFF	European maritime and fisheries fund
EMU	European Monetary Union
ERDF	European regional development fund

ESA	European Supervisory Authority
ESCB	European System of Central Banks
EuSEF	European Social Entrepreneurship Fund
ESF	European Social Funds
ESFS	European System of Financial Supervisors
ESIF	European Structural and Investment Funds
ESM	European Stability Mechanism
ESMA	European Securities and Markets Authority
ESRB	European Systemic Risk Board
EU ETS	European Union Emissions Trading Scheme
EU	European Union
EuVECA	European Venture Capital Fund
FTT	Financial Transaction Tax
GDC	General Directorate of Competition
GDP	Gross domestic product
GNP	Gross national product
HFT	High-frequency trading
HRL	Human rights law
IL	International law
ILO	International Labour Organisation
IMF	International Monetary Fund
LLC	Limited liability company
MNE	Multinational enterprise
NCA	National Competition Authority
NGO	Non-governmental organisation
OAPEC, OPEC	Organization of Arab Petroleum Countries
OECD	Organisation for Economic Co-operation and Development
OKL	*Osuuskuntalaki* (Co-operatives Act) 1488/2001
OLAF	European Anti-Fraud Office
OTM	Outright Monetary Transactions
OYL	*Osakeyhtiölaki* (Limited Liability Companies Act) 624/2006
PLE	Private law entity
PSPP	Public Sector Purchase Programme
R&D	Research and Development
SCE	European cooperative company
SE	European company

SGEI	Services of general economic interest
SGI	Services of general interest
SMEs	small and medium-sized enterprises
SRM	Single Resolution Mechanism
SSM	Single Supervisory Mechanism
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TNimiL	*Toiminimilaki* 128/1979
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNHRC	United Nations Human Rights Council
UNPGs	United Nations Guiding Principles on Business and Human Rights
VAT	Value Added Tax

PART I INTRODUCTION & METHODOLOGY

1 INTRODUCTION

This chapter introduces the research at hand. Chapter 1.1 contextualises the research briefly describing the causes and consequences of the financial and economic crisis of 2008–2014. It recognises how the crisis posed a challenge for the European economic system and raised questions about the role of corporations'. Chapter 1.2 presents a review of the literature. It recognises that the absence of a clear conception of corporations as legal persons in the context of EU law. Chapter 1.3 outlines the aims and objectives of the research and formulates the research questions. The aim of the research at hand is to increase our understanding of the role and powers of corporations as legal entities. The objectives of the research are (1) to develop a model for the legal personhood and legal powers of corporate entities applicable in the EU; (2) to analyse the impact of the secondary legislation adopted by the EU during the financial and economic crisis on the legal powers of corporations; and (3) by applying the models on corporate legal personhood and legal power, to recognise the key variables determining the legal powers and legal relations of corporate entities in the framework of the EU legal system. Chapter 1.3 also presents six questions that the research seeks to answer

1.1 Setting the Scene

> The EU is currently undergoing grave economic difficulties and considerable social unrest. The Norwegian Nobel Committee wishes to focus on what it sees as the EU's most important result: the successful struggle for peace and reconciliation and for democracy and human rights. The stabilizing part played by the EU has helped to transform most of Europe from a continent of war to a continent of peace.
>
> - Norwegian Nobel Committee, 2012 [1]

In 2009, the world faced a global economic recession, the deepest recession since World War II. The economic recession was triggered by the United States mortgage crisis two years earlier, but amplified by the interconnectedness of the global

[1] Norwegian Nobel Committee 2012, The Nobel Peace Prize for 2012: https://www.nobelprize.org/prizes/peace/2012/press-release/. (Accessed on 9 July 2020.) Although the Nobel Peace Prize is usually awarded to individuals, the EU was far from being the first organisation, or even intergovernmental/supranational organisation to be awarded the prize. The International Committee of Red the Cross has been awarded the Nobel Peace Prize thrice (1917, 1944 and 1963) and the Office of the United Nations High Commissioner for Refugees twice (1954 and 1981).

financial system. The US financial crisis led to the collapse of the global financial firm Lehman Brothers in 2008, and the crisis spread across the Atlantic.[2] The US and Europe, with their closely interconnected financial sectors, suffered most from the instabilities in the operations of the financial and banking sector.

The economy is cyclical, and periodic ups and downs in economic growth are normal. However, according to the International Monetary Fund (IMF), the recession of 2009 was global and the deepest recession since World War II .[3] It resulted from the weaknesses of the global financial system, was triggered by the bursting of the United States housing bubble. The collapse in September 2008 of Lehman Brothers, a US-based global financial firm exposed the global interconnectedness of the financial sector. It influenced the financial and banking sector, particularly in the USA and Europe. Some European countries seemed to be facing an economic downturn even before the repercussions of the US mortgage crisis hit the European real economy. However, in 2009 the European economy was in its deepest recession since the 1930s.[4]

The mortgage crisis did not only expose global interdependence in the global financial sector. It demonstrated the close interconnection of the financial economy with the real economy. The instabilities of the financial sector resulted in a decrease in demand and rising unemployment. The struggles of the financial sector were reflected in the production sector as well as the service industry. In the hope of protecting the interests of investors and shareholders, the business resorted to layoffs and redundancies. The expectation and realisation of unemployment reduced consumption, thereby fanning the flame of recession. The financial crisis also led to recognising the 'too big to fail' phenomenon. While Lehman Brothers was allowed to fail, the US government bailed out a major insurance company, the American International Group (AIG). Chapter 7 will provide a further description of the crisis and the measures adopted in response to it in Europe. Suffice it here to recognise how the crisis shook the very foundations of the European Union. Arguably, it has been one of the most critical challenges for the contemporary European Union.[5] One of the underlying reasons for the financial and economic crisis was the *insufficient regulation and supervision of the financial sector*.

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[2] For a comprehensive inquiry report on the causes of the financial and economic crisis in the USA, see FCIC 2011.

[3] IMF 2009, xii.

[4] European Commission 2009, iii.

[5] Chapter 11 discusses how the financial and economic crisis could be considered yet more challenging to the structures of the Union than the COVID-19.

The banking sector has been strictly regulated throughout the course of history. The close relation to the Member States' national interests delayed the creation of a European internal market for banking and insurance services for a significant period. Free movement of capital developed more slowly than the free movement of goods, services and workers. However, the general liberalisation trend that began in the 1980s provided an opportunity to liberalise the financial and banking sector. But not without some discord.

The 1980s seemed to steer the economy towards more liberal markets after a long period of building welfare states. Jacques Delors, the President of the European Commission from 1985 to 1995, promoted regulated capitalism, supported markets as well as individual responsibility, and encouraged trade unions and solidarity.[6] Delors took the view that the Commission's task was to help preserve extensive social services and civilised industrial relations and sustain solidarity by negotiated transfers among groups. Delors also envisaged a role for the Commission in steering economic activity for the general welfare.[7] However, during Delors' term of office, the global trend of *laissez-faire* challenged this idea of the extensive welfare state. In the 1970s and 1980s, two significant factors emerged to defy the European welfare model based on State revenues, public production of services and income distribution. The first factor was the increasingly free movement of capital and economic globalisation and the subsequent ability of international financial institutions to influence the condition of public finances. This development urged the United States to adopt a floating exchange rate in 1971. The traditionally used gold standard[8] was rejected in order to respond to decreasing global economic competitiveness of the United States.

The second factor was the oil crisis of 1973, which began with the *Yom Kippur War* between Israel and the Arab countries, which broke out in October. After the brief conflict, the Arab countries established an oil embargo on countries considered

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[6] Hooghe 2001, 70. According to *Vivien A. Schmidt*, state-influenced market economies can be divided into state-enhanced market economics (typically associated with France), entrepreneurial states (associated with France, Korea and Taiwan), and state-led capitalism (associated with Japan), *et cetera*. (Schmidt 2009, 520.) Britain is a typical liberal market economy, while the German model has been recognised as representing a coordinated market economy where the State is enabling, acting to arbitrate among economic actors as well as facilitate their activities. (Schmidt 2009, 521.)

[7] Hooghe 2001, 70.

[8] 'The gold standard is a monetary system whereby a country's currency or paper money has a value directly linked to gold. With the gold standard, countries agreed to convert paper money into a fixed amount of gold. A country that uses the gold standard sets a fixed price for gold and buys and sells gold at that price.' Source: Investopedia: https://www.investopedia.com/ask/answers/09/gold-standard.asp (Accessed on 27 December 2018).

hostile, including almost every Western European nation. Furthermore, the Organization of Arab Petroleum Exporting Countries (OAPEC or OPEC) raised oil prices. With the embargo and price upscaling, the price of oil quadrupled in a few months, significantly affecting the economic position of the European Community, which was, at that time, the world biggest oil importer.[9]

While the EC Member States faced recession, floating exchange rates encouraged businesses to move to a more business-friendly economic environment. These fluctuations resulted in an international community gravitating towards a more liberal regulatory environment further strengthened by the collapse of the Soviet Union in 1991. In addition, the challenges faced by traditional industries, the rising oil price, the energy crisis and increased globalisation created a demand for new economic policies.[10]

It seems that European Union economic law and its interpretation has developed through crises. The oil crisis created a favourable political environment for emerging neoclassical economic doctrines. President Ronald Reagan in the United States and Prime Minister Margaret Thatcher in the United Kingdom implemented policies influenced by Friedrich August von Hayek and Milton Friedman. The two leaders on both sides of the Atlantic were at the forefront of adopting policies generally described as austerity measures, aiming to reduce public spending to tackle the economic recession and attract capital.[11] In Europe, the turning tide shifted the focus from policies aiming to correct markets to the competing idea of making the markets, especially in the financial and banking sectors.[12]

The Union began with the liberation of the movement of goods, services and workers. Liberating capital movements were at the forefront and centre of policies during the 1980s and 1990s. The free movement of capital is closely related to the free movement of banking and insurance services.[13] However, the free movement of capital developed slowly because of the close interconnection with financial policies and taxation of the Member States.[14] Today, Article 63(1) TFEU provides that 'all restrictions on the movement of capital between the Member States and between Member States and third countries shall be prohibited', while Article 65

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[9] Source: Europedia: http://www.europedia.moussis.eu/books/Book_2/6/19/01/01/?all=1 (Accessed on 3 December 2018).

[10] Laffan, O'Donnell & Smith 2000, 26–27.

[11] See Patomäki 2007, 10–11.

[12] See Laffan, O'Donnell & Smith 2000, 27; Hooghe 2001, 80.

[13] See Article 61(1) EEC.

[14] See Snell 2011.

protects the right of Member States to protect their tax laws and prudential supervision of financial institutions.[15]

The European Union with other intergovernmental economic organisations, including the Organisation for Economic Co-operation and Development (OECD), the International Monetary Fund (IMF) and the World Bank, began to put forward the idea of markets as the primary source of the production and distribution of wealth in society, as well as strict regulation of public finances. The new economic paradigm meant pushing for free trade, lower taxes, privatisation of state-owned enterprises and cuts in social spending.[16] Perfect competition protected by the State would itself take care of social needs.[17] As described by Margot E. Salomon*:*

> Capitalism's modern variant of the past forty years has been underpinned by deregulation, privatisation, free trade and investment, and the withdrawal of the state from many areas of social provision. On this account, human well-being is best satisfied by the market, and the role of the state is to guarantee the conditions that best allow the markets to function, including through the creation of new areas for commodification, such as water, education and health care.[18]

While the European Community regulated the common markets on principles of free trade and competition, the Member States built and maintained comprehensive welfare systems with redistributive policies. The Commission 1994 White Paper on social policy described values such as democracy and individual rights, free collective bargaining, the market economy, equal opportunities for all, and social protection and solidarity. Nevertheless, the social model is based on the conviction regarding competitive markets: 'Competitiveness and solidarity have both been taken into account in building a successful Europe for the future.'[19] As a result, a shift from the state-coordinated market economy to a more liberal market economy took place. While the State could still be considered an influential actor in promoting social equality[20], economic growth, financial stability and sustainable public economics had to be considered.[21]

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[15] See Craig & de Búrca 2015, 772–773. See also Directive 88/361/EEC, Articles 1–4.

[16] Nolan 2014, 1. See e.g. Laffan, O'Donnell & Smith 2000, 26. This policy had global influence in especially South America, Middle East, Asia and Eastern Europe. See Klabbers 2011, 16–17.

[17] Nicholls 1994, 12, ff. 5.

[18] Salomon 2015, 541.

[19] COM/94/333 final, [3].

[20] On liberal market economics (LMEs), coordinated market economies (CMEs) and state-influences market economies (SMEs), see Schmidt 2009, 519–520.

[21] Macro-stability forms one side of the so-called 'Europe's prosperity triangle', the two other sides being economic growth and equality. (Pichelmann 2013, 2, Figure 1.)

These dynamic changes reflect especially on the second layer rules and macroeconomic policies of the Member States, but also the rules on internal markets. During this period, the European Union aimed to develop an internal market for capital through deregulation. In addition, the European Union encouraged the liberalisation of the financial and banking sector.[22] However, at the peak of the financial crisis, the same economic system that was supposed to bring Europeans peace and prosperity seemed to result in many losing everything they had.

From 2010, the sovereign debt crisis magnified the economic situation in several Member States. Sovereign debt crisis, or eurozone crisis[23], refers to a balance-of-payment crisis where Greece, Portugal, Ireland, Spain and Cyprus could not pay their national debts or gain access to additional funding through financial markets. As a result, additional funding would have been required to pay previous debts and finance additional government expenditures needed to bail out the failing banks or tackle other costs of the crisis. The sovereign debt crisis resulted in the establishment of the European Stability Mechanism (ESM) in 2010. The ESM enabled inter-State financing between the eurozone Member States. In addition, the European Central Bank also implemented the Outright Monetary Transactions programme (OMT) and Public Sector Purchase Programme (PSPP), purchasing government bonds and marketable debt instruments issued by governments to support the Member States in financial difficulties.[24]

Despite the measures adopted, the sovereign debt crisis prolonged the period of economic stagnation. Public resources were scarce, but the macroprudential rules protecting price stability and balanced economic growth restricted the use of counter-cyclical policy measures.[25] The crisis also raised questions about the behaviour of business in general.

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[22] Full description of the process, see Snell 2011.

[23] See e.g. Tuori & Tuori 2014.

[24] The ESM is a judicially separate intergovernmental organisation whose members include the eurozone Member States, the European Commissions and European Central Bank. Although the ESM was established in 2010, the Treaty on the Functioning of the European Union was amended in 2011 to incorporate the establishment of a stability mechanism between the Member States whose currency is the euro to safeguard the stability of the euro area. (Article 136(3) TFEU. See European Council Decision 2011/199/EU) Article 123(1) TFEU prohibiting central bank credit in favour of 'Union institutions, bodies, offices or agencies, central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of Member States'. However, as the prohibition outlined by Article 123(1) concerns only direct purchases, the ECBS has been able to purchase government bonds from the secondary market. (See e.g. ECB/2010/5. See also CJEU judgements in cases C-62/14 *Gauweiler and Others* [2015] ECLI:EU:C:2015:400 and C-493/17 *Weiss and Others* [2018] ECLI:EU:C:2018:1000.)

[25] See below Ch. 6.

While the recognition of corporations as autonomous entities and their legal powers stems primarily from national legislation, the fact is that the European Union plays a pivotal role in determining the extent and limit of corporate power. Therefore, instead of focusing on how corporations are represented in various European legal systems, the research recognises the impact of the EU on the legal governance of corporations focusing on the supranational level.

Today's EU is widely recognised as a constitutional legal system, with separate legal entities and legal autonomy.[26] Article 47 of the Treaty on European Union recognises the entire European Union's legal personality, making it an 'independent entity in its own right'. The widest competencies for the EU are in the area of economic life, which is due to the history of European integration: The creation of the European Coal and Steel Community (ECSC), its development into the European Community (EC) and the European Economic Community (EEC) and finally into the European Union.

The Union is highly influential in the regulation of market actors, such as corporations. Union legislation leaves its mark on the legal power and legal relations of corporate entities. The idea of the role of business incorporated into the EU law pervades the Member States' legal systems. The EU has influenced the management of the worst financial and economic crisis of the 20th century and the governance of the key actors, corporations. When a global pandemic creates significant challenges for the European economy, it is no less unreasonable nor untimely to ask fundamental questions about corporate power's legal governance in Europe.

The aim of the research at hand is to increase our understanding of the role and powers of corporations as legal entities. As further described in Chapter 1.3, the research objectives are: (1) to develop a model for the legal personhood and legal powers of corporate entities applicable in the EU; (2) to analyse the impact of the secondary legislation adopted by the EU during the financial and economic crisis on the legal powers of corporations; and (3) by applying the models of corporate legal personhood and legal power, to identify the key variables determining the legal powers and legal relations of corporate entities in the framework of EU legal system. Chapter 1.3 also formulates six research questions.

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[26] Another international economic organisation mentioned in the literature as a possible source of a supranational constitution is the World Trade Organisation (WTO). Currently the WTO is not considered to fulfil the criteria of the constitutional order as its ability to create state-binding regulation does not rest on constitutional competence, but rather on strategies adopted by states to protect their competitiveness and competitive advantages. See e.g. Dunoff 2009, 179–182. On alternative interpretations of the constitutional status of the WTO, see Dunoff 2009, 184–192, on constitutional features of various intergovernmental organisations in general, see Dunoff & Trachtman 2009; Trachtman 2009; Gill 2008.

The research objective is to recognise fundamental ideas about the nature of corporations as legal entities. To this extent, as Chapter 3 describes, the research recognises the nature of the legal system as a social system that interacts with political, social and economic systems. The ontology of the research implies that extrajudicial factors determine the scope and limits of corporate entities as autonomous legal persons. The epistemological position of the research is that by studying the legal system with legal methodologies, one may reveal the embedded ideas and underlying assumptions originating from the surrounding social worlds. However, before going further into the methodology, the following chapter reviews the existing literature. It summarises the key observations on the legal powers of corporations. It also recognises the gaps that remain in our knowledge of the legal nature of corporations. Chapter 1.3 argues that by bridging this gap, the research provides the groundwork for both academic and practical discussion around the public management and legal governance of corporations.

1.2 Literature Review

1.2.1 Corporate Legal Powers & the EU

According to Article 54 of the Treaty on the Functioning of the European Union (TFEU),

> Companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Union shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States.

Hence, under Treaty law, the rights and liberties established by the Union also extend to companies and firms, unless the entity is non-profit. The European Union thus recognises corporate entities as legal entities. By attributing a legal personality to corporations, the EU confers on them legal powers. By conferring legal powers to corporations, the EU influences the national doctrines of corporate legal powers and legal personality as legal entities. The influence may be channelled directly *via* Company Law or indirectly *via* other regulations. However, the precise nature of corporations as legal entities in the EU remains open both in legislation and in the earlier literature. Before the Company Law Directive (EU) 2017/1132, supranational legislation concerning the establishment of companies was limited to

the 2003 Statute for a European Cooperative Society (SCE) and the 2001 Statute for a European Company (SE).[27]

Holger Fleischer (2010) states how the EU has 'bypassed the issue of the doctrinal history of legal personality' of corporations[28]. Fleischer arrived at this conclusion by studying the legislation of two supranational corporate forms recognised by EU law; the European Company (*Societas Europaea*, SE) and the European Cooperative Company (*Societas cooperativa Europaea*, SCE). Fleischer describes the key characteristics and elements of supranational corporate forms, recognising cross-border involvement as one of the key features. This observation corroborates the fact that the European Union established the SE and SCE to support the internal market opportunities of multinational European businesses.[29] The national recognition condition established in Article 54 TFEU also applies to the European Company and European Cooperative Company. While both SE and SCE are autonomous legal entities created by supranational law, the conditions of their recognition as legal entities is two-fold: Members of the SCE or SE need to reside in at least one of the Member States, or the laws of at least one of the Member States need to govern the subsidiaries of the company.[30] Fleischer compared the legal personality, corporate purpose, and objects of supranational corporate forms to national legislation. He concluded that the EU has avoided the issues of legal personality 'by simply and succinctly attributing legal personality (*Rechtspersönlichkeit, personnalité juridique*) to the SE [and] SCE'.[31]

Despite regulating corporations and establishing two supranational corporate forms, the European Union has not taken a stand on the legal personhood of corporate entities. According to Fleischer, supranational regulation has focused on filling the gaps created by differences between Member States' laws.[32] Since Fleischer's research, the EU has adopted a Company Law Directive. Directive (EU) 2017/1132 relating to certain aspects of company law codifies key articles concerning the establishment and functioning of limited liability companies (LCCs).

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[27] Reg. (EC) No 1435/2003; Reg. (EC) No 2157/2001, Article 2.

[28] Fleischer 2010, 1704.

[29] Paragraph 3 of the Preambles of the Council Reg. (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE) establish how '[t]he legal framework within which business should be carried on in the Community is still based largely on national laws and therefore does not correspond to the economic framework within which it should develop if the objectives set out in Article 18 of the Treaty are to be achieved'.

[30] Reg. (EC) No 1435/2003, Article 2; Reg. (EC) No 2157/2001, Article 2.

[31] Fleischer 2010, 1704.

[32] Ibid., 1716.

According to the Directive, an LCC is a company with 'share capital and having legal personality, possessing separate assets which alone serve to cover its debts and that is subject'.[33] However, the directive has not changed the key elements. According to Article 2(1), '[t]he coordination measures prescribed by this Section shall apply to the provisions laid down by law, regulation or administrative action in Member States'.

Corporate entities are legal entities in the European Union *if the establishment of the entity has followed the national laws of one of the Member States,* which could explain why the Union has restricted itself to filling gaps and codification. However, neither the nature of corporations as entities whose existence stems primarily from national legislation nor the lack of stance on the doctrinal nature of corporate entities has stopped the EU from regulating the legal capacities of corporations. The European Union actively governs corporate behaviour, particularly in the internal market, but also outside it[34].

Legal research has studied the extent and limits of corporate legal capacities in the European Union, focusing on the rights derived from the establishment of the internal market.[35] The creation of the internal market entailed eliminating customs duties and quantitative restrictions. The creation of an internal market area resulted in the establishment of free movement of workers (Article 3(2) TEU; Articles 4(2)(a), 20-21, 26 and 45-48 TFEU), freedom of establishment (Articles 49(1) and 55 TFEU), and freedom to provide services (Articles 56 and 62 TFEU). The free movement of capital relates closely to the free movement of banking and insurance services.[36] However, the free movement of capital developed slowly because of its close connection to the Member States' financial policies and taxation.[37]

Today, Article 63(1) TFEU provides that 'all restrictions on the movement of capital between the Member States and between the Member States and third countries shall be prohibited'. By the doctrine of direct effect established by the Court of Justice of the European Union (CJEU) in *Van Gen den Loos*[38], these freedoms created 'rights for individuals which the national courts must protect'.[39]

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[33] Dir. (EU) 2017/1132, Art 119(1)(b).

[34] On extraterritoriality, see e.g. Bradford 2012 & Cooreman 2016.

[35] E.g. Hoffman 2017; Tuleasca 2011; Fleischer 2010; Gold & Schwimbersky 2008; Duina 2006.

[36] See Article 61(1) EEC.

[37] See Snell 2011.

[38] Case 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECLI:EU:C:1963:1.

[39] de Witte 2011, 330.

From these freedoms, the Court of Justice derived the principles of equal treatment, non-discrimination, mutual recognition, proportionality and transparency in *Defrenne*[40] and *Angonese*[41]. These principles also have a direct effect on private law relations. In *Mangold,*[42] the Court held that the principle of equal treatment also has a direct effect in horizontal relations.

As the legal liberties, rights and duties of corporate entities in the internal market are open to interpretation, legal research is often very interested in the case-law of the Court of Justice of the European Union. Research studying the freedom of establishment, for example, has focused on cases such as *Centros*[43]*, Überseering*[44] and *Kamer*[45].[46] In addition, multiple studies have emerged around the CJEU's judgement on *Digital Rights Ireland* from 2014[47]and the General Data Protection Regulation (GDPR)[48] on the protection of natural persons concerning the processing of personal data and the free movement of such data issued in 2016[49].

The research so far reflects a pragmatic perspective and often a case-by-case approach to studying corporate legal powers. Research on corporate legal duties focuses on competition law, such as the prohibition of the abuse of dominant market position, cartels and State aid.[50] Outside competition law, the research addresses Union environmental regulation, competencies established by the Treaty of Maastricht. The research addresses waste regulation, chemical regulation[51], electrical and electronic equipment regulation, and the European Union Emissions Trading Scheme (EU ETS)[52]. Regulation of internal and external relations and corporate

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[40] Case 43/75 *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena* [1976] ECLI:EU:C:1976:56.

[41] C-281/98 *Roman Angonese v Cassa di Risparmio di Bolzano SpA* [2000] ECLI:EU:C:2000:296.

[42] C-144/04 *Werner Mangold v Rüdiger Helm* [2005] ECLI:EU:C:2005:70.

[43] C-212/97 *Centros Ltd v Erhvervs- og Selskabsstyrelsen* [1999] ECLI:EU:C:1999:126.

[44] C-208/00 *Überseering BV v Nordic Construction Company Baumanagement GmbH (NCC)* [2002] ECLI:EU:C:2002:632.

[45] C-167/01 *Kamer van Koophandel en Fabrieken voor Amsterdam v Inspire Art Ltd* [2003] ECLI:EU:C:2003:512.

[46] E.g. Mörsdorf 2012; Rothe 2004; Heine 2003.

[47] C-293/12 ja C-594/12 *Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung and Others* [2014] ECLI:EU:C:2014:238.

[48] Reg. (EU) 2016/679.

[49] E.g. Gilbert 2016; Tankard 2016; Kotschy 2014; Axinte, Petrică & Bacivarov 2018; Rotenberg & Jacobs 2013; Voss 2016.

[50] See e.g. Maher 2011, Lindberg 2015.

[51] E.g. Gilbert 2011.

[52] E.g. Gonçalve 2013; Gabaldon-Estevan, Mezquita, Ferrer & Monfort 2016.

governance has also attracted attention among legal scholars.[53] Liability towards shareholders[54], labour and consumers[55] are common themes in research. Predictably, the themes studied are influenced by topical issues. Since the financial and economic crisis, for example, research has been presented on the regulation of banks and financial institutions generally[56], the enhanced legal protection of shareholders[57] and consumers[58], and tax avoidance.[59] The post-crisis research has also voiced some critical notions towards the deregulatory trend in labour law[60], corporate governance and corporate social responsibility[61]. Whether regulation introduced to govern the financial and banking sector is sufficient has also been questioned.[62]

Nevertheless, legal research often focuses on the legal requirements established for corporations and their impact on business operations. These lack references to systematic studies on the extent and limit of corporate legal capacities or the common concept of their legal personhood. Peter Oliver (2015) makes an invaluable exception by comparing companies' fundamental rights in the case-law of the European Court of Human Rights, the European Court of Justice, and the US Supreme Court. The fundamental rights studied by Oliver include the right to property, the privilege against self-incrimination, freedom of speech, double jeopardy, the right to make political donations and freedom of religion. Oliver draws attention to the European Charter of Fundamental Rights (CFR). The Charter does not generally contain provisions on which articles apply to legal persons such as corporations in addition to natural legal persons.[63] Exceptions are Articles 42 to 44 CFR on the rights to access documents, submit a complaint to the Ombudsman and to petition the European Parliament. Oliver highlights cases where the European Court of Justice has extended these rights to companies. In *DEB*[64]*,* the Court of

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[53] E.g. Hermes, Theo & Zivkov 2006.

[54] E.g. Amand 1998.

[55] E.g. Holden & Hawkings 2018; Bradford 2012.

[56] E.g. Quaglia 2013; Davies 2012; Moloney 2010; Klinac & Ercegovac 2018; Sarra 2012; Gilson, Hansmann & Pargendler 2011.

[57] E.g. Avgouleas & Cullen 2014; Ferran 2011; Mukwiri & Siems 2014.

[58] E.g. de Jager 2017; Mendez-Pinedo 2018.

[59] E.g. Jensen & Forbes 2016; Kuźniacki 2017.

[60] E.g. Lillie 2016; Bagdi 2015.

[61] E.g. Beckers 2017.

[62] E.g. Kudrna 2016; Avgouleas & Cullen 2014.

[63] Oliver 2015, 680.

[64] C-279/09 *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland* [2010] ECLI:EU:C:2010:811.

Justice held that companies enjoy in some circumstances the right to legal aid established by Article 47 of the CFR .[65] The freedom to conduct business, first recognised in *Nold*[66], has been successfully argued on several occasions, such as *Scarlet Extended*[67] and *Alemo-Herron*[68].[69] Corporations also have limited access to the privilege of non-self-discrimination. The test case was *Orkem*[70], after which the Court has applied and confirmed the rule on several occasions.[71] According to the primary legislation, companies also have rights based on the principle of non-discrimination, established in Article 21(1) CFR, supplemented by Article 3(2) TEU and 8 and 157 TFEU.[72] There are no cases in the Court of Justice of political donations or freedom of religion in the case of corporations.[73]

According to Oliver, 'companies may enjoy fundamental rights for two reasons: because it is essential to protect their own interests; and because it is necessary for the sake of the public interest'.[74] Unfortunately, neither reason provides a clear conception of what fundamental rights corporations should enjoy and to what extent. Based on case law, however, Oliver concludes as follows:

> Equally, different categories of legal person are entitled to different rights. In many contexts, companies' fundamental rights will be more limited than those of non-profit entities, since their goals differ profoundly.[75]
>
> The starting point must be that companies are fully fledged legal persons in their own right and must be treated as such, save in the highly exceptional situations where piercing of the corporate veil is appropriate.[76]

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[65] Oliver 2015, 680.

[66] Case 4/73 *J. Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities* [1974] ECLI:EU:C:1974:51.

[67] C-70/10 *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)* [2011] ECLI:EU:C:2011:771.

[68] C-426/11 *Mark Alemo-Herron and Others v Parkwood Leisure Ltd [2013]* ECLI:EU:C:2013:521.

[69] Oliver 2015, 683–84.

[70] Case 374/87 *Orkem v Commission of the European Communities* [1989] ECLI:EU:C:1989:387.

[71] Oliver 2015, 685–86.

[72] Ibid., 688.

[73] Ibid., 688–692.

[74] Ibid., 694.

[75] Ibid., 695.

[76] Ibid.

> Companies must enjoy the fundamental rights essential to their functions and purpose, namely the right to property and the right to run a business (where such a right exists) as well as the right to a fair trial.[77]

And

> [--] piercing the corporate veil for the benefit of the stakeholders should be confined to highly exceptional situations. One case where this seems permissible is where a company suffers discrimination by reason of the gender, race or religion of its stakeholders: in that case, the stakeholders are the real target of the discrimination.[78]

Peter Oliver makes a valuable contribution to the systematisation of the EU's legal system by analysing the case-law of the Court. It emphasises the economic nature of fundamental rights in the EU compared to the European System of Human Rights.[79] Oliver's research also contributes to our understanding of the nature of corporations as legal entities, particularly how they *enjoy the fundamental rights essential to their functions and purpose, i.e., running a business*. However, we also need to discuss the legal obligations of corporations.

Treaty provisions on judicial cooperation in criminal matters state that the European Parliament and the Council may adopt directives to establish minimum rules concerning the definition of criminal offences and sanctions. These provisions apply to particularly serious crimes with a cross-border dimension.[80] Minimum rules on sanctions may also apply to corporate entities. According to Nicola Selvaggi (2014), Member States must *choose* which sanctions apply to collective entities. Selvaggi points out how the EU provides that the offence must be committed for the benefit of the corporate body in order for criminal sanctions to be imposed on the corporate body.[81] Benefits of corporate body imply that a corporate body has its *own* interests. However, EU law does not further contemplate the difference between the interests of the corporate body and the associated natural persons.

The discussion on corporate criminal liability in cases of human rights violations not covered by Article 83(1) TFEU focuses on whether corporations may, or should, have liability for gross human rights violations.[82] As human rights are protected in

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[77] Ibid.

[78] Ibid., 696.

[79] Ibid., 683.

[80] Crimes included are terrorism, human trafficking, sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime. (Article 83(1) TFEU.)

[81] Selvaggi 2014, 53.

[82] E.g. Grimheden 2018; van Dam & Gregor 2017; Kirshner 2015.

Europe by legislation, such as labour law, the discussion focuses on human rights violations outside the EU legal system. The following chapter provides a brief review of literature discussing corporate liabilities in the framework of international law (IL) and international human rights law (HRL).

1.2.2 Corporations in IL & HRL Literature

In the global economy, production is scattered around the world. Primary production, such as mining and harvesting, occurs in developing countries. Of the products used in the EU, many are manufactured outside Europe, from raw materials collected outside Europe. Manufacturing, and particularly primary production, may be hazardous for the labour, the environment, or people otherwise living in the sphere of influence. International discussion on the minimum regulatory standards has continued for decades.

Many legal systems accept that corporations enjoy international legal rights and may be liable for multiple legal duties. However, the current situation is a far cry from a consensus on the extent of rights and limits of responsibilities. J.G. Ku argues that there is insufficient international consensus to treat corporations directly as subjects of international law, excluding some very limited cases.[83] Such cases include the core principles of labour law: The prohibition of child labour, forced labour and slavery. The principles are part of International Labour Law established in the ILO Treaties, constituting part of international customary law binding on all actors.[84]

The sphere of International Law remains divided as regards, for example, the international legalobligations of multinational enterprises (MNEs). Steven R. Ratner (2001) and Markos Karavias (2015) argue that law necessitates state-corporate relationships for international laws to apply to corporations as legal entities directly. Steven R. Ratner's interpretation seems to agree that international law may create legal duties for corporations towards actors with 'whom they have special ties'.[85] Ratner highlights the protection of corporations from non-contractual duties while recognising legal restrictions in cases of 'those sorts of rights that the corporation can directly infringe', such as employee rights.[86] According to Ratner, making claims

[83] Ku 2012.

[84] See Clapham 2006, 214.

[85] Ratner 2001, 449.

[86] Ibid., 511.

of corporate liability requires international legal standards. Ratner states that without international standards

> [t]he resultant atmosphere of uncertainty will be detrimental to both the protection of human rights and the economic wealth that private business activity has created worldwide.[87]

However, such international standards do not yet exist, despite attempts to create them.

The first significant attempt to create legally binding duties for business was the United Nations (UN) Declaration on the Establishment of a New International Economic Order adopted on 1 May 1974.[88] This declaration promoted the full sovereignty of states to regulate and supervise corporations and transnational corporations operating in their area, especially the control of national resources. The objective was to create international rules for the conduct of multinational corporations. While the Declaration initially gathered support from the more developed states, the global economic situation of the late 1970s turned the tide towards deregulation, and liberalisation resulted in the rejection of the declaration. The second attempt to create regulation on a global level occurred in August 1998, when the UN Sub-Commission on the Promotion and Protection of Human Rights established a Working Group on Transnational Corporations. The Working Group attempted to create standards for the human rights obligations of corporations. The final draft of the declaration, 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights', was presented in 2003.[89] However, the draft, as well as subsequent attempts to reform it, was also rejected.

Instead of binding norms, future attempts focused on getting corporations to adopt more responsible business practices voluntarily. For example, A Global Compact, proposed by the Secretary-General Kofi Annan in 1999[90], had by November 2018 gained the commitment of almost 10,000 companies from 160 countries.[91] These corporations voluntarily commit to the principles derived from the Universal Declaration of Human Rights, the International Labour Organization's

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[87] Ibid., 448.

[88] Resolution adopted by the General Assembly, 3201 (S-VI) on 1 May 1974. Declaration on the Establishment of a New International Economic Order. (A/RES/S-6/3201).

[89] See E/CN.4/Sub.2/2003/12/Rev.2.

[90] See SG/SM/6881.

[91] Global Compact: https://www.unglobalcompact.org/ (Accessed on 20 December 2018).

Declaration on Fundamental Principles and Rights at Work, the Rio Declaration on Environment and Development, and the United Nations Convention against Corruption.[92] The system is based on voluntary reporting and is financed by voluntary contributions from governments and companies.

Human rights litigation against companies violating human rights has been 'disillusioning because no corporation has been found guilty and most cases have been dismissed' as Judith Schrempf-Stirling and Florian Wettstein described.[93] Moreover, according to Fergus Green, the International Court of Justice has been arbitrary and incoherent in legal issues involving non-state actors.[94]

As for the 'wider group of subjects', as expressed by Ratner[95], the international community has contemplated the idea to some extent. The United Nations, the OECD and the European Union have discussed whether they could redefine the sphere of responsibility to include other subjects than employees. They have not reached a consensus.[96] The legal rights and duties of corporate entities and the possible direct applicability of international law and human rights law in private relations remain undetermined.

Traditional human rights law discourse does not recognise the binding nature of human rights on any other actors than the State. As described by Hugh Collins, private law nevertheless incorporates many social values represented by human rights.[97] The values of human rights law are reflected in the protection of weaker parties in contractual relations, as well as on the protection of 'life, liberty, privacy, and freedom of association, property, speech, conscience and so on against individuals or private bodies', as described by Dawn Oliver and Jörg Fedtke.[98] The

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[92] See UN Global Compact's Ten Principles: https://www.unglobalcompact.org/what-is-gc/mission/principles (Accessed on 13 October 2016).

[93] Schrempf-Stirling & Wettstein 2017, 545.

[94] Green 2008.

[95] Ratner 2001, 506–511.

[96] Ibid.

[97] Collins 2014, 26–27.

[98] Oliver & Fedtke 2007, 3. Oliver's and Fedtke's analysis is based on several country-specific studies concerning Denmark (Christoffersen 2007), England and Wales (Oliver 2007), France (Hunter-Henin 2007), Germany (Fedtke 2007a), Greece (Akrivopoulou 2007), India (Singh 2007), Ireland (O'Cinneide 2007), Israel (Barak-Erez & Gilead 2007), Italy (Favilli & Fusaro 2007), New Zealand, (Rishworth 2007), South Africa (Fedtke 2007b), Spain (Rodríguez Liboreiro 2007), The United States and Canada (Barendt 2007), and the European Convention of Human Rights (Spielmann 2007). Oliver's and Fedtke's conclusions reflect the most common approach to the applicability of human rights in private law relations. The cases of India and South Africa especially, however, reflect how the issue is culturally contextual.

primary duty of private actors is to respect the civil and political rights of others.[99] Legitimate limitations on liberties include limitations made to protect third parties from 'non-contractual liabilities', although parents' duty to take care of their children is recognised.[100] While recognising the imbalance of power as a possible source of duties, as in the case of parents and children, Oliver and Fedtke consider this imbalance to be most significant between the State and individuals. Although Oliver and Fedtke recognise that the enormous powers of emerging global companies may change this balance, the possible consequences of the growing social powers of MNEs remain unaddressed.[101]

Corporate entities seem to remain entities with a sphere of autonomy, protected against public intervention even as such noble objectives as the protection of the fundamental rights of others. In spite of some disagreements on the sources of extra-contractual legal duties for corporations, there is a common idea that there are limits to corporate liabilities stemming from their nature as private law entities. There is, however, an alternative approach that recognises the nature of corporations as entities created by the State.

1.2.3 Berle & Corporations as State Entities

In 'Constitutional Limitations on Corporate Activity' (1952), an American legal scholar Adolf S. Berle Junior, recognises how the State is responsible for the national economy and the well-being of its citizens. This responsibility creates a political demand to regulate the economy. Berle also reminds the reader that corporations are not natural legal persons. *The State recognises corporations as legal entities*. The abuse of State-granted rights may result in a corporation losing its legal status. The operations of corporations and State functions were closely intertwined in the 1800s, and the idea of corporate autonomy hardly existed. As Berle described in 1952: 'The emerging principle appears to be that the corporation, itself a creation of the state, is as subject to constitutional limitations which limit action as is the state itself.' Corporations acquire powers granted to them by federal status, and hence, belong to the public sphere.

> Had the question come up, let us say, in 1800, when there were only 300 recorded corporations in the United States, all of which derived their authority from the states

[99] Oliver & Fedtke 2007, 3.

[100] Ibid., 9–10.

[101] Ibid., 16.

> or predecessor colonies, the lawyer arguing that they were purely private and, because private, not within the scope of constitutional limitations on governmental action would have had the difficult side of the argument.[102]

From this perspective, the legal powers of corporate entities are those granted to them by the State. A radical interpretation would be that the legal powers of corporate entities are a matter for the State's will alone because corporations as legal entities would not exist without State authority.[103]

Berle recognises, however, that by the late nineteenth century, corporations became increasingly understood as private organisations. Berle states that irrespective of this development, as legal entities created by the State, corporations still needed to conform to the fundamental rules and principles set out in the Constitution.[104] The legal restraints described by Berle, resonate with Oliver's and Fedtke's accounts of legal power.

> If this doctrine, now coming into view, is carried to full effect, a corporation having economic and supposedly juridical power to take property, to refuse to give equal service, to discriminate between man and man, group and group, race and race, to an extent denying "the equal protection of the laws," or otherwise to violate constitutional limitations, is subject to direct legal action.[105]

According to Berle, private actors use *de facto* economic or political power enhanced by law. These powers may also be a source of legal obligations on horizontal relations where corporations impose their own rules upon third parties. Restriction of power, hence, stems from the protection of third parties for non-contractual duties. In addition to business, associations with potential economic and political power included labour unions.

Berle's approach opens exciting possibilities for an alternative interpretation of the nature of corporations as legal entities and the systematisation of their legal powers. It does not provide a comprehensive account of the extent of the legal powers of corporate entities. Neither is it directly applicable to a legal system

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[102] Berle 1952, 945.

[103] A claim which Arthur W. Machen, Jr, contests by stating how '[a]ll that the law can do is to recognize, or refuse to recognize, existence of this entity. The law can no more create such an entity than it can create a house out of a collection of loose bricks. If the bricks are put together so as to form a house, the law can refuse to recognize the existence of that house - can act as if it did not exist; but the law has nothing whatever to do with putting the bricks together in such a way that, if the law is not to shut its eyes to facts, it must recognize that a house exists and not merely a number of bricks.' (Machen 1911a, 260.)

[104] Berle 1952, 943.

[105] Ibid., 942.

representing different periods and cultures. However, it provides a fascinating historical insight into the state-corporation relation.

> We may have dismissed the history of companies from our minds.[106] However, it is not forgotten. As described by John Micklethwait and Adrian Wooldridge, when the American continent was found, 'chartered companies represented a combined effort by governments and merchants to grab the riches of the new worlds opened up by Columbus (1451–1506), Magellan (1480–1521), and Vasco da Gama (1469–1524)'.[107] They were secured exclusive rights, or *monopolies,* to secure that the risk they took to bring the wealth of the new world to the old world paid off.[108] Also, the financing of such endeavours started to develop. The selling of *shares* on the open market has been known already in the Middle Ages. However, 'the naval capitalism of the sixteenth and seventeenth centuries dramatically expanded the idea, bringing stock exchanges in its wake.[109] The first official chartered joint-stock company was the Muscovy Company, a charter given in 1555.[110] Limited liability was a privilege. In America, before the early nineteenth century, the privilege of limited liability was granted only to companies engaging in public works.
>
> This direct connection between public interest and limited liability changed gradually. The State of Massachusetts was first to decide that engagement in public work was not required from a company to gain access to such privilege and enforced changes in the 1800s.[111] Other states followed soon after. According to Micklethwait and Wooldridge: '[t]his competition between the states was arguably the first instance of a phenomenon that would later be dubbed "a race to the bottom" with local politicians offering greater freedom to companies to keep their business'.[112]
>
> The attitudes towards limited liability companies were and remain ambivalent. While joint-stock companies were able to collect capital and grow, some considered the limited liability unable to create sufficient commitment of partner-owners.[113] Also, the commitment of managers and other agents did not measure up. Especially in Europe, the interest to intervene with corporations by regulation increased, some

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[106] See Micklethwait & Wooldridge 2003, 7–8.

[107] Micklethwait & Wooldridge 2003, 49–50.

[108] Ibid., 31–32. These exclusive rights could be referred to as 'privileges'. Also, as described by Micklethwait and Wooldridge '[t]he early American states used chartered corporations, endowed with special monopoly rights, to build some of the vital infrastructure of the new country—universities (like America's oldest corporation, Harvard University, chartered in 1636), banks, churches, canals, municipalities, and roads. The first business corporation was probably the New London Society for Trade and Commerce, a Connecticut trading company chartered in May 1732.' (Micklethwait & Wooldridge 2003, 57–58.)

[109] Ibid., 31–32.

[110] Ibid., 32–33.

[111] See Dodd 1944, 230.

[112] Micklethwait & Wooldridge 2003, 61.

[113] Ibid., 56–57. See Halpern, Trebilcock & Turnbull (1980) for an interesting economic analysis and the historical references to the curses and gifts of limited liability.

even demanding direct control. This approach of 'freedoms, rights and privileges' was transformed with the Companies Act of 1862 adopted in the United Kingdom.

Furthermore, the meddling of corporations in wars and politics during the 1700s and 1800s increased pressure to regulate companies, especially in Britain and America.[114] Britain implemented regulatory control more forcefully from these two, which reflected a difference in philosophy. For American industrialists, companies were an end in themselves. They were to be tended and grown. For British industrialists, companies were a means to a higher end: A civilized existence. Companies were there to be harvested.[115]

In the same line with Britain with its relations to corporations was Germany. However, German companies of the nineteenth century had several distinguishing features. One of the features was that the corporate control of joint-stock companies included the management board responsible for day-to-day decisions and a supervisory board. The supervisory board consisted of various interest groups, including local politicians and trade unions. They have exercised direct control over companies, while the British model was more about regulatory control. All in all, the German economic model emphasised the social role of companies.[116] Especially during the end of his era as Chancellor of the German Empire, *Otto von Bismarck*: '[--] imposed a comprehensive "social insurance" system on companies, forcing them to pay pensions; in 1891, he introduced a system of "codetermination," giving a formal voice to workers on companies'[117].

As told by Micklethwait and Wooldridge, the history of the joint-stock company reveals how the economic efficiency of such coalitions has been recognised already in Roman law and Medieval Europe, either recognising 'corporate persons'. For a significant period, corporations were closely related to the political state. They took care of State operations, such as producing transportation services or raw material for the industry. Few today recognise that such companies were often state-sponsored.[118] As corporations have come to 'possess most of the legal rights of a human being'[119], they are often seen as an extension of individual autonomy.

The paradigm shift since the 1980s seems to have relieved corporations of societal obligations. The financial and banking sector in particular, which began to operate via private profit-seeking large corporations, became a powerful locomotive for the economy. This development has significantly influenced corporations' legal relations in the 20th century through deregulation. However, the history of corporations as legal entities should be kept in mind when analysing the public management of their

[114] Ibid., 42–43.

[115] Ibid., 97–99.

[116] Ibid., 104–107.

[117] Ibid., 107–108.

[118] Ibid.

[119] Ibid.

legal powers. Public management balances between competing interests and connects to questions about politics, social values, ethics, and the overall legitimacy of the societal system. These issues may influence the regulation of corporate entities, their legal status and their legal powers.[120]

1.2.4 Summary of Observations & Research Gaps

Article 54 of the Treaty on the Functioning of the European Union provides that 'companies or forms formed in accordance with the law of a Member State' should 'be treated in the same way as natural persons who are nationals of Member States' in their enjoyment of the freedom of establishment. According to Peter Oliver's (2015) research on the CJEU case-law, corporations also 'enjoy the fundamental rights essential to their functions and purpose, namely the right to property and the right to run a business (where such a right exists) as well as the right to a fair trial'[121]. It is, hence, clear that the European Union attributes legal powers to corporations as legal entities. However, the EU has avoided the questions of how, why and to what extent corporations as legal entities hold legal powers? As described by Holger Fleischer, the EU has 'bypassed the thorny issue of the doctrinal history of legal personality'[122] by 'simply and succinctly attributing legal personality [--] to the SE [and] SCE'[123]. The codification of European company law in the Company Law Directive 2017/1132 has not shed any further light on the issue of legal personality, for according to Article 2(1) '[t]he coordination measures prescribed by this Section shall apply to the provisions laid down by law, regulation or administrative action in Member States'.

The first research gap recognised therein is the question of the nature of corporations as legal persons in the European Union: Where does the legal personhood of corporate entities originate from? Do they differ from natural persons, and how? Why do corporations have separate legal personhood from the associated natural or legal persons, that is, the founders and owners of the corporate entity?

The second research gap relates to the legal powers of corporations as legal persons: What is the scope of corporate legal powers, and are there any limits? What

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[120] See Virtanen 2014, 315.

[121] Ibid.

[122] Fleischer 2010, 1704.

[123] Ibid.

determines the scope and limits of corporate legal powers generally and in legal relations, whether horizontal relations with other private law entities (PLEs) or vertical relations with public law entities? While the European Union has avoided taking a stand on the legal personhood of corporate entities, it significantly influences the legal powers of corporate entities in the Member States. A wide range of research exists on the four freedoms of the European internal market and their applicability to corporations as described above.[124] However, systematic research on corporate legal powers seems to be lacking. While Peter Oliver (2015) provides the essential groundwork for understanding the legal powers of corporations in the EU, further study is required to understand the source(s), the scope and the limits of those powers. (Table 1.)

The following chapter outlines the aims and objectives of the research at hand and formulates the research questions.

	CORPORATE LEGAL PERSONHOOD	**LEGAL LIBERTIES AND RIGHTS**	**LEGAL DUTIES**
European Union Fleischer 2010; Oliver 2015; Selvaggi 2014	*N/A (national law determines)*	*Essential for doing business*	*Criminal liability IF offence benefits the corporate entity*
International Law & Human Rights Law Ku 2012; Ratner 2001; Karavias 2015; Collins 2014; Schrempf-Stirling & Wettstein 2017; Green 2008; Oliver & Fedtke 2007	*Private law entities*	*Sphere of autonomy; protection against state intervention*	*Core principles of international labour law apply* *IL & HRL apply IF direct state-corporate relation*
Berle's Model (1952)	*Recognition from the State*	*Provided by the State to complete social function*	*Protection of constitutional values*

Table 1. Conceptions of corporations as legal persons.

[124] See above Ch. 1.2.1.

1.3 Research Objectives & Questions

The research aims to increase our understanding of the nature of corporate entities as legal entities in the framework of the European Union legal system. It takes the economic and social challenges of the early twenty-first century to study the developments in the legal powers and legal relations of corporations in the EU and identify the key variables determining the liberties, rights and duties of corporations in both horizontal and vertical relations. The objectives of the research are (1) to develop a model for the legal personhood and legal powers of corporate entities applicable in the EU; (2) to analyse the impact of the secondary legislation adopted by the EU during the financial and economic crisis on the legal powers of corporations; and (3) by applying the models to corporate legal personhood and legal power, to recognise the key variables determining the legal powers and legal relations of corporate entities in the framework of EU legal system.

A theoretical model is, of course, only an approximation of reality. This research proposes preliminary models for further discussion and development. The absolute accuracy of a model is, however, not indispensable to its applicability. Nevertheless, even preliminary models of corporate legal personhood and legal powers will provide a valuable framework to discuss corporate legal powers, including extrajudicial ideas, beliefs and values about efficient and legitimate governance embedded in the European Union legal system.

The research questions can be formulated as follows:

(1) What are the legal powers of corporate entities as autonomous legal persons in the European Union legal system?

(2) Where do the legal powers of corporate entities as autonomous legal persons originate in the EU?

(3) Are there any general principles governing the legal powers of corporate entities?

(4) How were the legal powers and legal relations of corporate entities influenced by the measures adopted by the EU to respond to the challenges posed and perpetuated by the financial and economic crisis?

(5) How do the measures adopted reflect the legal personhood and general principles of the legal governance of corporate entities?

(6) What are the key judicial and extrajudicial variables that determine the legal powers and legal relations of corporate entities as autonomous legal persons in the EU? (Table 2.)

Before starting the search for answers to these questions, the following chapter will provide some insights into the existing models of corporate legal personhood and introduce key concepts and frameworks used for the study of corporate legal powers.

	Research Objectives		Research Questions
(1)	to develop models for the legal personhood and legal powers of corporate entities applicable in the EU	**Q1**	*What are the legal powers of corporations as autonomous legal entities in the European Union legal system?*
		Q2	*Where do the legal powers of corporate entities as autonomous legal persons originate in the EU?*
		Q3	*Are there any general principles governing of the legal powers of corporate entities?*
(2)	to analyse the impact of the secondary legislation adopted by the EU during the financial and economic crisis onto the legal powers of corporations	**Q4**	*How were the legal powers and legal relations of corporate entities influenced by the measures adopted by the EU to respond to the challenges posed and perpetuated by the financial and economic crisis?*
(3)	by applying the models on corporate legal personhood and legal power to recognise the key variables determining the legal powers and legal relations of corporate entities in the EU	**Q5**	*How do the measures adopted reflect the legal personhood and general principles of legal governance of corporate entities?*
		Q6	*What are the key judicial and extrajudicial variables that determine the legal powers and legal relations of corporations as autonomous legal entities in the EU?*

Table 2. Research questions and objectives.

2 THEORETICAL FRAMEWORK

This chapter describes the theoretical framework and key concepts of the research. Chapter 2.1.2 defines the concepts of legal personhood. Chapter 2.1.2 introduces three competing corporate legal personhood models: the real entity model, the aggregate entity model and the artificial entity model. Chapter 2.1.3 reviews the models to provide the hybrid model of corporate legal personhood used in the research. Chapter 2.2.1 proceeds to introduce the Hohfeldian typology of legal powers and legal relations. Finally, Chapter 2.2.2 presents a review of the Hohfeldian typology recognising the trilateral nature of all legal relations, which will serve as a basis for the analysis of the legal powers and legal relations of corporations as legal persons.

2.1 Models of Corporate Legal Personhood

2.1.1 On Legal Personhood

This research probes the nature of corporate entities as *legal entities,* taking the view that legal entities are entities recognised by law and have meaning from the perspective of the legal system. It is, however, considered that being a legal entity itself does not endow the entity with legal powers, that is, legal rights, liberties, privileges and duties. This research considers legal entities with legal rights but no legal duties and liabilities, nor capacity to change their legal status as legal subjects. According to this definition, animals, nature and unregistered companies are legal subjects. We can provide animals with legal duties by law. However, they would not understand the illegality of their actions. As described by Dewey

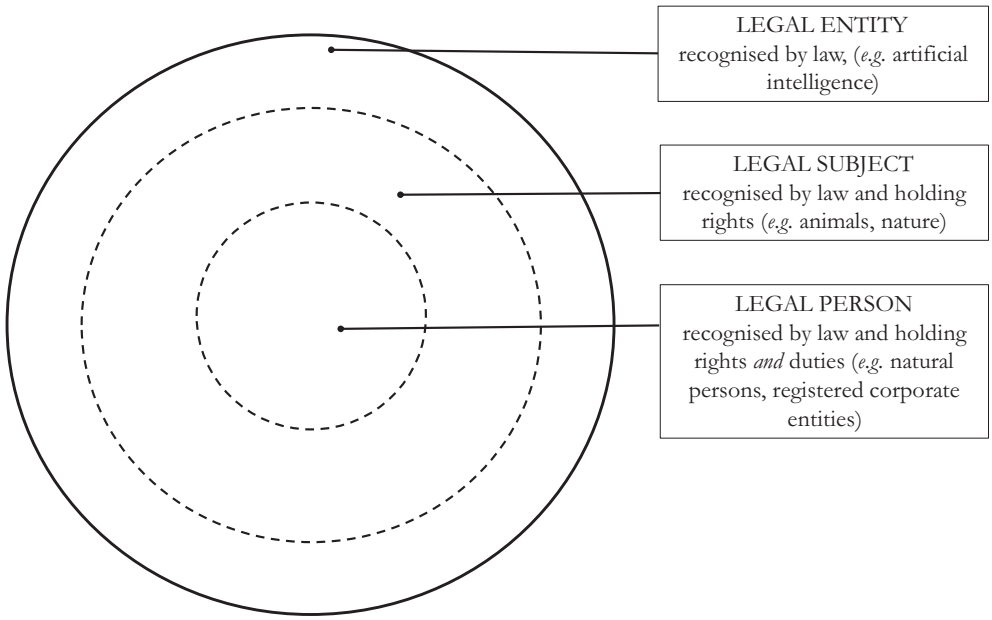
> Molecules and trees certainly have social consequences; but these consequences are what they are irrespective of having rights and duties. Molecules and trees would continue to behave exactly as they do whether or not rights and duties were ascribed to them; their consequences would be what they are anyway. But there are some things, bodies singular and corporate, which clearly act differently, or have different consequences, depending upon whether or not they possess rights and duties, and

according to what specific rights they possess and what obligations are placed upon them.[125]

Instead, the rights of animals and nature create corresponding legal duties for individuals and the State, and these are the actual legal persons. In this research, legal persons are legal entities with legal rights and legal duties and the capacity to establish and change legal relations. This research, hence, follows Arthur W. Machen, Jr., and considers that the essence of legal personhood is not the possession of rights but the possession of duties.[126] (Figure 1.)

Legal persons may have legal powers and legal relations to their fullest extent. While legislation can limit the legal powers and legal relations of legal persons with certain qualities such as minors, convicted criminals, or non-natural legal entities, legal persons have, nevertheless, legal powers and the capacity to change their legal relations. [127]

Figure 1. Legan entitites, legal subjects and legal persons.



[125] Dewey 1926, 661.

[126] Machen 1911, 264. Machen criticises imposing criminal liabilities on slaves who had no actual rights.

[127] Hohfeld 1913–1914, 44.

John Chipman Gray described in 1902 how

> --- 'person' is often used as meaning a human being, but the technical and legal meaning of a 'person' is a subject of legal rights and duties.[128]

Gray also distinguished different kinds of persons recognised in various legal systems and classified them as normal human beings, abnormal human beings, supernatural beings, animals, inanimate objects and juristic persons, such as corporations.[129] According to Gray, corporation is an organised body of human beings 'united for the purpose of forwarding certain of their interests'.[130] The legal personhood of corporations has raised academic interest throughout two centuries. Arthur W. Machen Jr. described in 1911 how

> The Roman law gave but little consideration to what corporations, and the whole law of the subject consisted number of ambiguous and unfortunate phrases which have sources of much of the confusion both in English law and in the law of Continental Europe. The canon law, while it devoted consideration to the subject, did not develop any well theory.[131]

Machen reviews deliberation around the legal personhood of corporate entities (CEs) from Germany, Italy and the English-speaking world. He concludes that corporations are widely recognised as real entities, although without a body or a soul.[132] Machen proposed that corporations are real but impersonal legal entities and that there is practical and doctrinal justification for treating CEs as real entities.[133] In the beginning of the twentieth century, the interest in legal personhood faded. Lyman P.Q. Johnson described how the important discussion about the 'rightful societal expectations of corporate conduct' involves the question of corporate personhood. Johnson, however, concludes that the teaching and studying of corporate law have sidestepped this issue.[134]

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[128] Campbell & Thomas 1997, 19.

[129] Ibid.

[130] Ibid., 31.

[131] Machen 1911a, 255.

[132] Ibid., 253. For an historical account of the appearance of corporate legal personality, see also Gindis 2016. On the influence of cultural context on corporate personhood, see Johnson 2012. Legal subject vs. legal personality, as well as metaphysical vs. physical personality, see Clapham 2006, 71–73.

[133] Machen 1911b.

[134] Johnson 2012, 1164.

The early twenty-first century has resurrected the question of corporate legal personhood. The discussion around various models has resurfaced since 2010.[135] The following chapter provides an overview of the competing models, followed by a review of the models and the construction of a hybrid model.

2.1.2 Overview of Models of Corporate Legal Personhood

There are three competing models of the legal personhood of corporations:

- 'concession theory' or 'artificial entity model', which view corporations as creatures of the State;
- 'aggregate theory' or 'contracts model' that views corporations as aggregates of their members and especially shareholders; and
- 'real entity' model views the corporation as a separate entity distinct from its members.[136]

The 'concession theory' or 'artificial entity model' views corporations as creations of the State. The artificial entity model is related to 'fiction theory'. Fiction theory states that 'the corporate body is but a name, a thing of the intellect'.[137] David Gindis has described artificial entities as 'unnatural', comparing them to individuals as 'natural' legal persons due to their 'natural' capacity to attract rights and duties.[138]

Michael J. Phillips has described how

> The concession and fiction ideas dominated American theorizing about corporations in the first part of the nineteenth century. During this period, corporations were individually created by a specific legislative grant (the special charter), which usually limited them to purposes of a public nature. In such an environment, it may have been plausible to regard corporations as creatures of the State and little else, because government played so decisive a role in creating them and in determining what they could do.[139]

The artificial entity model described corporations as artificial entities 'created by the state and possessing only the powers that were specifically invested in it by its

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[135] E.g. Gibson 2011; Watson 2019.

[136] Donyets-Kedar 2017, 63.

[137] Dewey 1926, 667.

[138] Gindis 2016, 503.

[139] Phillips 1994, 1065. See also Berle 1952.

charter', as summarised by Donyets-Kedar.[140] As an artificial entity, a corporation 'can only act for the specific purposes for which it was designed'.[141] The strong link between the State and corporations influences the rights of corporations.[142] The artificial entity model also creates a strong link between the State and the legal duties of corporations.

The 'aggregate theory' or 'contracts model', on the other hand, views corporations as aggregates of their members, especially shareholders.[143] Other possible members include directors and managers. Some would extend the membership to other stakeholders, such as customers and employees.[144] However, most aggregate entity theorists are 'sceptical about the notion that corporations have social responsibilities to nonshareholder constituencies such as employees, suppliers, customers, and local communities', as described by Phillips.[145]

This model considers the corporate entity as a 'nexus of contracts'.[146] According to Donyets-Kedar:

> Under the aggregate theory, the business corporation is no longer conceived of as a creature of the state, but is rather thought of as the product of individual enterprise. Severing their strong ties to the state as posited by the grant theory, corporations under the aggregate model are legitimated in rebuffing state regulation, stressing instead the private, contractual elements of the corporate idea.[147]

In the aggregate entity model, the legal powers of CEs stem from the rights and interests of the associated natural legal persons, primarily shareholders.[148]

The 'real entity model', on the other hand, views corporations as separate entities, distinguishable from their members. The real entity model has two fundamental propositions, as described by Arthur W. Machen, Jr.: '(1) that a corporation is an entity distinct from the sum of the members that compose it, and (2) that this entity

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[140] Donyets-Kedar 2017, 64.

[141] Ibid.

[142] Ibid., 64–65.

[143] See ibid., 66. The aggregate entity models sometimes disagree on the definition of 'associated member'. This research recognises that there might be different groups of associated members from whom the CE has different levels of autonomy. These groups may include shareholders, other stakeholders, such as consumers or employees, and stakeholders without any formal contractual relations to the corporate entity. These relations are, again, determined by the State.

[144] Phillips 1994, 1066.

[145] Ibid., 1091.

[146] Donyets-Kedar 2017, 65.

[147] Ibid., 66.

[148] Phillips 1994, 109–1099.

is a person'.[149] This entity exists without recognition from the State, or individual members, for it is more than the sum of its parts.[150]

> A corporation exists as an objectively real entity, which any well-developed child or normal man must perceive: the law merely recognizes and gives legal effect to the existence of this entity.[151]

In the real entity model, CE is analogous with a natural legal entity in its possession of legal powers. As described by Phillips, in this model

> [--] corporations may have drives and interests that the law might sometimes be obligated to respect; and also may have moral duties that restrict their freedom of action. But if corporations are sufficiently like natural persons to have such drives, interests, and duties, they may have rights-especially economic rights-as well.[152]

A CE may thus hold all the legal powers of natural legal persons. It can have a mind, intentions, interests and a sense of morality.[153]

2.1.3 Review of Models of Corporate Legal Personhood & Application

At first glance, it would seem that different models provide different attributes for corporate entities, including legal powers. The artificial entity model confers on CEs only those rights and duties the State deems necessary for their function, while the real entity model endows CEs with the same rights and duties as natural persons.

When considering the legal powers in more detail, however, each model may be manipulated to accommodate a variety of legal powers.[154] John Dewey argued already in 1926 how each theory has been used to serve opposing ends.[155] Michael J. Phillips concluded in 1994 that a complete theory is neither at hand nor on the horizon.[156] In 2017 Ronit Donyets-Kedar supported Dewey's claim by stating how

> concerning the scope of corporate constitutional rights and corporate social responsibility – showing that each of the dominant models of corporate personhood

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[149] Machen 1911, 258.

[150] Ibid., 260.

[151] Ibid., 261.

[152] Phillips 1994, 1097–1098.

[153] Machen 1911, 348.

[154] Ibid., 76–77.

[155] Dewey 1926, 655.

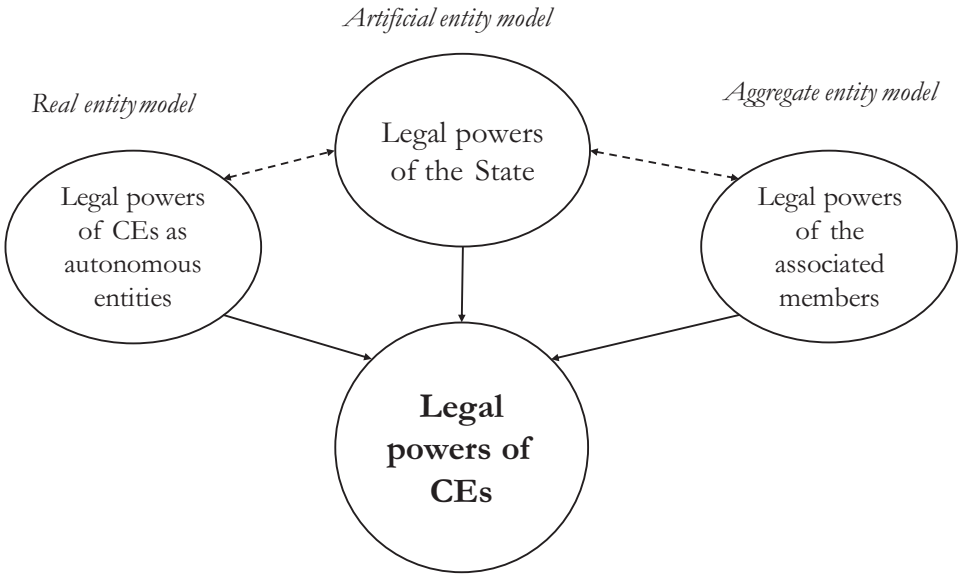
[156] Phillips 1994, 1123.

can, and in fact does, accommodate both a positive and a negative position with regard to both issues.[157]

Each model is amenable to manipulation to accommodate opposing views on issues such as corporate social responsibility[158]. Neither theoretical, practical, nor doctrinal justifications support any single model. None of the individual models *alone* is 'sufficiently well-grounded to be a solid basis for legal or policy implications', as described by Phillips.[159]

Rather than trying to force a particular set of legal powers onto a particular theoretical model and distinguishing one that corresponds with the legal powers of corporations in the EU, this research utilises all models. This hybrid theory of corporate legal personhood utilises all three pre-existing models simultaneously to provide an analytical framework, which may accurately describe different aspects of the legal powers of CEs. The review describes each model in relation to (a) level autonomy from associated individuals, such as owners, partners and shareholders, and (b) the level of autonomy from public power (State). (Figure 2.)

Figure 2. Hybrid theory of corporate legal personhood.



[157] Donyets-Kedar 2017, 70.

[158] Ibid., 76–77.

[159] Phillips 1994, 1063.

	Autonomy from the associated individuals	Autonomy from the State
Artificial entity	High	Low
Aggregate entity	Low	High
Real entity	High	High

Table 3. The level of autonomy of corporate entity from the associated members and the State.

The framework adopted for the research at hand assumes that the division between public and private is a question of *degree* rather than a *dichotomy*.[160] In the artificial entity model, the autonomy of the corporate entity from the State is low. In the aggregate entity model, the autonomy of the corporate entity from the associated entities is low, but the autonomy from the State is high. In the real entity model, the autonomy of a corporate entity is high from both the State and the associated individuals. Using this model makes it possible to distinguish different corporate forms according to their level of autonomy from the associated individuals. It is also possible to distinguish between different corporate forms according to their level of autonomy from the State.

The level of autonomy of the corporate entity from the associated members and the State determines its legal powers. (Table 3.) When the autonomy of the corporate entity with the State is low, the State determines the legal powers of the CE. If the level of autonomy of the CE from the State is high, its legal powers are equal to those entities with the same level of autonomy from the State, whether individuals or bodies of individuals. If the level of autonomy of the CE from the associated members is low, the associated members determine the legal powers of the CE. For example, they may transfer or refrain from transferring their legal powers to the corporate entity by common contract. On the other hand, if the CE has a high level of autonomy from the associated members, the legal powers of the CE are separate from the legal powers of the associated members.

The legal intervention of the State in legal relations explains why there might be entities with different levels of autonomy, including CEs with varying levels of autonomy, either from the State or the associated members. This research does not attempt to distinguish further between the different models of corporate entities and

[160] Cf. Bozeman 1987, xi; 83–85.

their relations to the associated members. It focuses on analysing the legal powers of corporate entities recognised as autonomous legal entities.

The relation of the CE to the associated members and the State does not itself reveal anything about the *content* of the legal powers; it merely reveals the *source* of its legal powers. It is also possible to provide CEs with attributes from several models simultaneously because their legal powers may stem from several sources. Considering all the legal powers that can be attached to a company, some of the legal powers of the companies originate from the legal powers of the associated members. The relation of the CE to the associated individuals or the State may influence its legal powers. On the other hand, some powers belong directly to the CE itself. To some extent, the legal powers of CEs originate from the State, especially if recognised as autonomous legal entities with the capacity to hold legal rights and other legal powers.

The legal powers of legal entities originate in the legal system. They reflect the societal ideas, values and beliefs embedded into the legal system. In a liberal society, for example, where the sphere of individual autonomy is large, i.e., the autonomy of the individuals from the State is high. In this case, the contractual relations between individuals are relatively free from State intervention. Furthermore, in establishing a form of cooperation, such as a company, individuals are free to decide how the cooperation will be conducted and the extent to which they transfer their legal powers to the cooperative entity, whether business or non-business. Chapter 3.1 reverts to these ideas and values embedded in the legal system. Suffice it to conclude that by using the various models of corporate legal personhood, this research aims to create a model of corporate legal personhood and recognise the sources of legal powers for CEs in the European Union. An incremental step in achieving this objective is to conduct a thorough systematisation of the legal powers of corporations in the EU legal system. The systematisation utilises the Hohfeldian typology of legal powers and legal relations, modified to accommodate the recognition of State-power in all legal relations.

2.2 Hohfeldian Typology of Legal Powers & Legal Relations

2.2.1 Overview of Hohfeldian Typology

Wesley Newcomb Hohfeld (1879–1918) was an American legal scholar and practitioner who aimed to systematise legal relations and distinguish between legal and non-legal relations.[161] Hohfeld studied legal relations in the framework of the American judicial system and based his observations on US case law.[162] His typology of legal relations is nevertheless applicable whether the legal system is a common law or a civil law system. The following aims to briefly summarise the relevant points of the Hohfeldian typology.

On legal power, Hohfeld notes how a person with legal power can produce bring about changes in the legal relations of themselves and also of others.[163] For example, a person owning an 'object' has the legal power to forfeit their ownership of that 'object' or to transfer the ownership to another person. Transference of rights is a contract, even if there is no written formal contract. Contractual relation without mutual transference of rights is a gift. The correlative of legal power is a legal liability. In contractual relations, the legal power of making a contract is followed by a *duty* (=legal obligation) to perform the contract.[164]

According to Hohfeld, individuals have privileges if they have no contractual relations. These may also be referred to as *liberties*. Privilege means that there is a correlative 'no-right'. As described by Hohfeld,

> whereas X has a right or claim that Y [--] should stay off the land, he himself has the privilege of entering on the land; or, in equivalent words, X does not have a duty to stay off.[165]

On the other hand, Y has a negative duty to stay off.[166] X has a legal power to change this legal relation by transferring their interest in the land to Y. X may also forfeit his

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[161] See Hohfeld 1913–1914, 21; 28.

[162] See Ibid., 19–20.

[163] Ibid., 44.

[164] Ibid., 45.

[165] Ibid., 32.

[166] According to *P. S. Atiyah*, negative duties are duties 'not to harm another's person, property or liberty'. Positive duties, on the other hand, are 'duties to assist or benefit another person. (Atiyah 2005, 86–87.)

privilege and allow everyone access to the land.[167] X and Y may also agree that Y shall buy the land from X.[168] Contractual agreement on the mutual transference of interests creates legal relations with rights and correlative duties. In this case, a contractual right to payment for the land and a corresponding duty to forfeit ownership is created. The privileges created by ownership are hence transferred from X to Y through the exchange of interests. Rights and duties created by such contractual agreements are rights and duties *in personam*.[169] (Table 4.)

In his research, Hohfeld focuses on rights and corresponding duties created by contractual legal relations and privileges and the corresponding 'no-rights' in non-contractual legal relations. Hohfeld never articulates what privileges are, nor where they derive from. Nevertheless, the model itself strongly implies the existence of a sphere of individual autonomy.[170] Neither does Hohfeld recognise the role of law in safeguarding privileges and enforcement of contractual duties. What is missing is the State's role in securing privileges and the enforcement of contractual duties.

The following review aims to modify Hohfeldian typology by introducing the public element into the legal powers and legal relations. It recognises the trilateral nature of horizontal relations between private law entities and vertical relations between individuals and the State (or other public law entities).

This review aims to fill these gaps in the Hohfeldian typology of legal powers and legal relations. The review illustrates the typology by introducing public power into the equation. In addition to general liberties (or privileges, as referred to by Hohfeld), contractual rights and contractual duties, the reviewed typology includes civic duties, particular rights, general rights and particular liberties. In this research, *particular liberties will be referred to as privileges*. The following section will further elaborate on the difference.

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[167] See Hohfeld 1917, 719; 721.

[168] Of course, there may also be more than two parties to an agreement. Articles of association establishing a company is a contract where partners mutually transfer rights to the company established and the company has duties to the partners as stated in the articles of association or Company Law.

[169] Hohfeld 1917, 718. For example, as described by Hohfeld, "[i]f Y has contracted to work for X during the ensuing six months, X has an affirmative right *in personam* that Y shall render such service, as agreed". (Ibid., 719) Y has a correlative personal positive duty to perform. While Y is under a positive duty to perform, all other persons can be seen to have a general negative duty not to intervene with Y when they are performing this as it would intervene with the positive rights of the X. (Ibid.)

[170] As described by *Jürgen Habermas*, the private sphere is a sphere of individual autonomy and freedom where 'private individuals may legitimately exercise free choice'. (Habermas 1984, 259.)

Subject Y	Right, duty	Privilege, no-duty
	↕	↕
Subject X	Duty, right	No-right, (negative) duty

Table 4. Hohfeldian typology of legal relations in personam.

Without including the State in the equation, it would be impossible to understand the true scope of legal powers and legal duties. Without recognising that legislation rather than contractual relations often limit general liberties belonging to the sphere of individual autonomy, the typology does not accurately reflect legal relations. Also, the fact that without contractual duties, a legal person holds general liberty rights can be seen to originate from the legal system, or at least the values embedded in the legal system.[171] The scope of these liberty rights is not universal. Socialist legal systems, for example, do not provide as wide a range of property rights as do liberal legal systems, as seems to underlie Hohfeld's analysis.

The Hohfeldian typology is, however, far from redundant. We nevertheless need to add another dimension to it. Instead of confining ourselves to describing legal relations as a bipartite relation between contractual parties, recognising the trilateral nature of legal relations recognises the legal powers and duties originating in law rather than contract, limiting contractual freedom. State power ultimately determines the scope of legal powers and the legal duties, for example, of corporations.

The following chapter takes the Hohfeldian typology and elaborates it to include the State's legal powers in both horizontal and vertical relations, supplemented with notions on legal rights and duties from John Chipman Gray's 'The Nature and Sources of Law', originally published in 1902.[172]

For the sake of simplicity, all public entities with coercive powers are henceforth referred to as States (S).

[171] See below Ch. 3.1.

[172] See Campbell & Thomas 1997.

2.2.2 Review on Hohfeldian Typology & Application

As described by P. S. Atiyah, contracts are important social institutions. This is why virtually all societies have developed laws for their enforcement.[173] Either moral or economic reasons justify the enforcement of contracts. Moral justification focuses on the rights and duties of contractual parties.[174] Economic justification rests on utilitarianism, on the idea that the enforcement of contracts 'facilitates mutually beneficial exchanges, and so promotes overall social welfare'.[175] Atiyah continues to describe how

> From an economic perspective, the primary reason a law of contract is needed is that most exchanges of any complexity cannot be performed simultaneously. One or both parties will have to perform in the future which means that the other party has to have confidence that she will perform.[176]

Contract law lays down remedies for breach of contract, which ultimately secures this confidence.[177] As an underlying assumption, the State has no legal right to intervene in contractual relations. The State (S) does, however, have a legal right to enforce the contract if one or both of the contractual parties so demands. In the case of contractual violation, the contractual party who violated the contractual trust has a corresponding legal duty to perform and make restitutions. As described by John Chipman Gray:

> The rights collative to those duties which the society will enforce on the motion of an individual are that individual's legal rights. The acts and forbearances which an organised society will enforce are the legal duties of persons whose acts and forbearances are enforced.[178]

And

> If its is my interest to receive a hundred dollars from Balbus, or if it is my interest to go out of a room, and if organized society imposes a duty upon Balbus to pay me, or impose a duty upon everybody not to interfere with my leaving the room, I have a legally protected interests and I have a legal rights.[179]

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[173] Atiyah 2005, 3.

[174] Ibid., 5.

[175] Ibid., 4.

[176] Ibid.

[177] Ibid.

[178] Campbell & Thomas 1997, 9.

[179] Ibid., 13.

In his model, Hohfeld focuses on the existence of privileges and the correlative no-rights or negative duties. Hohfeldian typology does not recognise extra-contractual obligations created by law. Such obligations include, for example, anti-discrimination.[180] Anti-discrimination is also essential in contractual relations, but it does not stem from the contract itself. Instead, public power intervenes in the sphere of contractual freedom and autonomy for reasons of general moral, general interests or to protect those in a vulnerable position.[181]

As John Chipman Gray described in 1902:

> Rights should be created neither solely to protect the freedom of the will nor solely to restrain it, but to establish and maintain those relations among men which are most for the advantage of society or of its members.[182]

Relations concerning private lives, such as marital and sexual relations, are regulated for moral purposes.[183] In order to protect general interests, legal systems have created general duties without corresponding general rights. Such unilateral duties are civic duties. Civic duties may include participation in national defence or the duty to pay taxes. States establish duties for citizens and social actors *either* (a) generally and equally *or* (b) according to their socially perceived capacities and capabilities. For example, the sick, elderly and children may not have to perform civic duties because they lacksufficient capacities or capabilities.[184] Legal sanctions are often imposed according to the carrying capacity of the actor or individual punished to secure the punitive effect of the sanction. Speeding fines, for example, can be proportional to income. As John Chipman Grey describes, civic duties are 'duties without rights'.[185]

> The rights correlative to those duties which the society will enforce of its own motion are the legal rights of that society.[186]

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[180] Atiyah 2005, 85.

[181] In Hohfeld's day, only white males enjoyed contractual freedom and protection of private sphere. Today in Western legal systems only minors and other persons under guardianship, or people sentenced under criminal law to fines or imprisonment, enjoy limited autonomy – at least ideally.

[182] Campbell & Thomas 1997, 16.

[183] Habermas 1996, 420–421.

[184] On facilities, duties and obligations see e.g. Hart 2012, 27–28.

[185] Campbell & Thomas 1997, 7.

[186] Ibid., 9.

Civic duties are often also based on gender. For example, Finnish military service is mandatory only for men.[187] In the case,, for example, of conscription for men of legal age, 18-year-old male X has a legal duty, while 18-year-old female Y has legal liberty. The State is the claimant of these duties. Be that as it may, the State is not the rights holder in the same sense as individuals in contractual relations. States do not have self-value as do natural persons.[188] The civic duties are not correlative to State rights, *per se.* Instead, they stem from the general interest which the States have the power and duty to protect. In some sense, civic duties are not duties towards the State but towards society.[189]

Often public power intervenes in the private sphere to protect the rights and interests of children and other individuals in a vulnerable position. For example, parents may have a legal duty to take care of their underaged children, and spouses may have a legal duty to take care of each other. These interventions create particular rights for weaker parties. They also create a corresponding particular duty for the stronger parties to assist or benefit the weaker parties. In this case, the law creates a corresponding claim to right-holder Y to be assisted by duty-holder X.[190] The duty-holder has, however, no corresponding right. If necessary, the State enforces the duty by using coercion. Unlike in relations based on civic duties, there are individual holders of particular rights and duties in these relations. The State, however, has a legal duty to protect the right-claim of Y and enforce the duty of X. In these cases, particular rights create real equality between legal persons in relations recognised by law, which may be contractual or non-contractual relations.

Particular rights may also correspond to particular liberties (i.e., privileges) required to secure the realisation of a privilege. Particular rights require positive measures to be taken to achieve *real equality* between *formally equal* actors in vertical relations. The positive actions include the establishment of particular duties in horizontal relations, where the duty-holder has no corresponding right-claim. The State has a positive vertical duty to protect particular rights also in horizontal relations. (Table 5.)

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[187] See Constitution of Finland (*Suomen perustuslaki*) 731/1999, 127 §; Law on Military Service (*Asevelvollisuuslaki*) 1438/2007.

[188] See Collins 2014, 27.

[189] See Ciacchi 2014, 104.

[190] See Collins 2014, 38.

	Contractual relation	Civic duty	Particular right	General right	Privilege	Liberty
Y	Contractual right, contractual duty, legal right, legal duty	Legal duty	Legal right	Legal no-right	Legal duty	Legal liberty, legal right
X	Contractual right, contractual duty, legal right, legal duty	Legal liberty	Legal duty	Legal right	Legal liberty,	Legal no-right, legal duty
S	Legal no-right, legal right, legal duty	Legal right, legal no-right	Legal duty, legal duty	Legal duty, legal duty	Legal right, Legal no-right	Legal duty, legal duty

Table 5. Legal relations in the Hohfeldian typology reviewed.

In Europe, the development of the welfare state in the period 1970–1980 significantly influenced the social understanding of freedom of contracts :

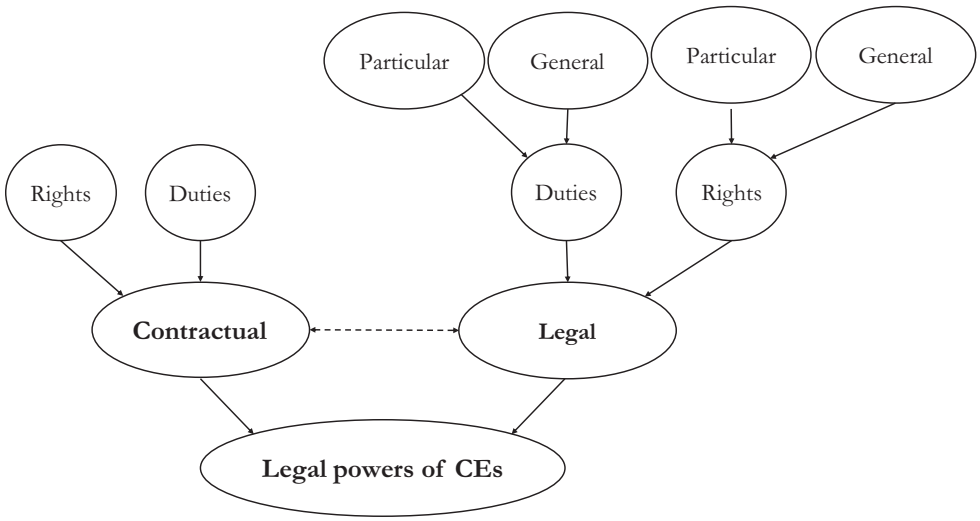
> The introduction of institutions such as state-funded education and medical care, not to mention unemployment insurance and welfare, can be understood in large part as premised on the belief that freedom of contract is an empty deal for those lacking the means to enter the market.[191]

Welfare states in particular provide individuals with general liberties and protection of these and with *general rights*, such as the right to health care and social security. When establishing general rights, the State has established a corresponding legal duty upon itself. These rights belong to every person (X), at least potentially. There may be legally established criteria for accessing the right. Such criteria may concern variables such as citizenship, residency, income, gender or age. Those persons (Y) not fulfilling the established criteria have no-right, in which case the State has no positive legal duty. The State may be considered to have a negative duty to refrain from granting such rights in cases where the person Y does not fulfil the legally established criteria for accessing the particular right in question. *Summa summary* general rights create a corresponding general duty for the State. General rights also create corresponding general duties equally for all actors recognised as right-holders.

There are also cases where individuals have exceptional liberties, referred to herein as *particular liberties*. For example, diplomatic immunity established in the Vienna Convention of Diplomatic Relations (1961) limits the scope of criminal

[191] Atiyah 2005, 14.

Figure 3. Mapping out the legal powers of corporate entities.

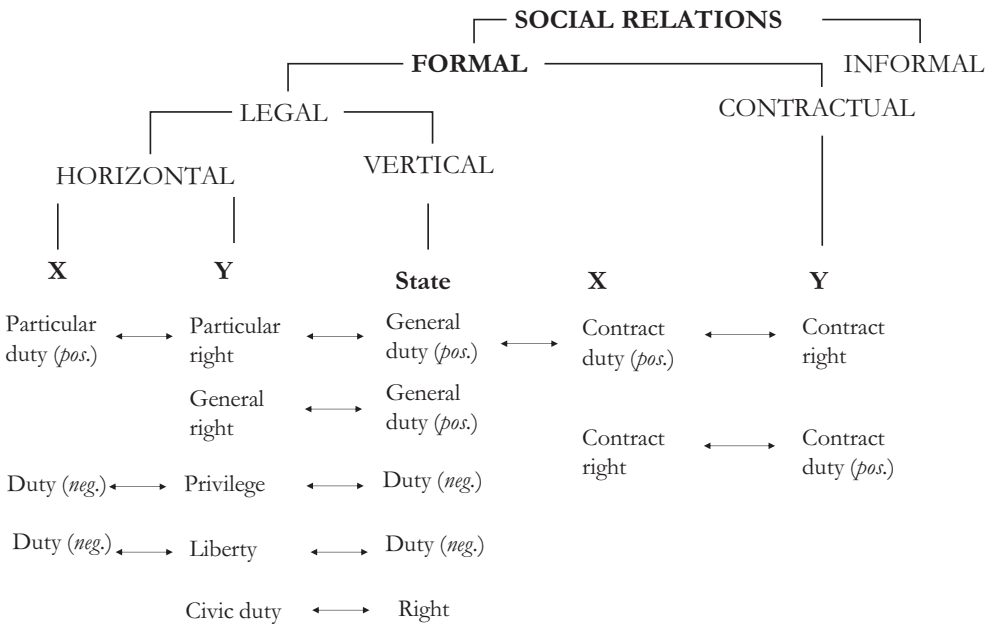


liability for diplomatic agents. According to Article 31 '[a] diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State'. Person X, who is a diplomat, has a legal liberty. The State, on the other hand, has a corresponding legal no-right to intervene with that liberty. Ordinary person Y has no such liberty but is obligated by criminal law, in which case the State has a legal right (or indeed a duty). What better to describe this legal power than 'privilege'?

Liberty is the sphere of no-duties of persons (Y); in other words, the sphere of individual autonomy. Neither other person (X) nor the State has legal right-claims on individual liberties. Instead, X has a legal duty to respect the liberty of Y, and the State has a legal duty to protect the liberty of individual Y from X. Undercriminal law, the State may establish remedies for violations of liberties which Y has the right to claim. General liberties are accessible to all not explicitly excluded from their scope (e.g. minorities). (Figure 3.)

The research at hand will apply this typology to analyse the legal powers of corporate entities. The analysis of the legal powers of corporate entities connects with the analytical framework of their legal personhood. Models of the legal personhood of CEs reflect ontological assumptions about the nature, role and functioning of corporate entities. This research uses the concepts of horizontal and vertical relations and negative and positive duties to further illustrate the nature of legal relations. (Figure 4.) While the research distinguishes rights, liberties and privileges, it refers to legal duties as 'duties', which may be positive or negative. While Hohfeld uses the term duty, terms with similar meanings can be recognised. The research uses the words 'duty', 'obligation', 'accountability', 'liability' and 'responsibility' as terminological substitutes.[192] The term 'duty' (or 'obligation',

Figure 4. Mapping out the legal powers and horizontal and vertical legal relations of corporate entities as autonomous legal persons.



[192] The connotations of these terms may in everyday speech include some differences, which should be recognised. The term 'Corporate Social Responsibility', for example, has been used to describe voluntary measures adopted by corporations to respond to social demands for more ethical business practices, as opposed to legal or contractual duties. Corporations are held internally accountable to their shareholders. While corporate actions have enormous effects on other people (Keohane 2009, 17), corporations are not accountable for their actions. Giving persons responsibility means allowing them still to act on their own premises; the concept thus relates more to personal liability. (Persson

'accountability', 'liability' or 'responsibility') may refer to a legal obligation or moral duty. In this research, when a duty is established by law and backed by sanctions, the prefix 'legal' may be used to accentuate the legal nature of 'obligation', 'accountability', 'liability' or 'responsibility' in question, and to distinguish these from contractual or moral duties.

2009, 144.) *H. L. A. Hart* provides in 'Concept of Law' (2012) a useful distinction between arbitrary duties, legal obligations and moral duties. Hart does not make distinctions between the terms 'duty' and 'obligation'. Nor has the study of the legal literature or official documents revealed any consistent use of terminology.

3 METHOD & DATA

This chapter describes the ontological and epistemological position of the research and the research method, process and data. Chapter 3.1 describes the ontological position: how the research recognises legal systems as social systems. It differentiates between static and dynamic principles originating in the social ideas, beliefs and values that create the sphere of possibility for legal governance, i.e., the realms of efficient and legitimate governance solutions. Chapter 3.2 describes the research method, process, and data. The primary methods are legal systematisation, analysis and interpretation. The research proceeds from the systematisation of primary legislation to formulate models of corporate legal personhood and legal power. It then applies the models to the secondary legislation. The application focuses on measures adopted during the financial and economic crisis and goes on to study the development of the role of corporations and to recognise the key variables that determine corporate legal powers. The research addresses the EU primary legislation, the general principles and legal doctrines of the European Union and the secondary legislation, related policy documents and non-legal instruments adopted between 2008 and 2014 and in early 2015.

3.1 Ontology & Epistemology

3.1.1 Legal System as a Social Institution

This research approaches legal systems from the perspective of *legal positivism*. Legal positivism sees the legal system as a set of legal rules laid down in a legislative process. It concedes that intentional and conscious decisions can modify these rules.[193] What does this mean from the perspective of recognising legal personhood and providing legal powers for corporations? David J. Calverley has described how 'it is logically possible to argue that law could simply define a legal person to be anything law chooses it to be'.[194]

While applying the ideas of legal positivism, the research recognises legal systems as social constructions. Rather than seeing legal systems 'as a closed system that

[193] Siltala 2001, 28 & 31.

[194] Calverley 2011, 224.

makes up its own rules and simply applies them to its objects'[195], this research recognises that law interacts with the surrounding society. The legal system 'draws factors outside to law to define its concepts' through this interaction.[196] Social ideas, beliefs and values, such as ideas about the purpose of corporations and beliefs about how they best fulfil their purpose, determine the legal rules laid down.

The recognition of the legal system as a social construction means recognising the relations between law and other social phenomena, such as power, politics and economics. It means recognising the ideas, beliefs and values of the surrounding social context. Legal norms do not exist in a vacuum. Neither are legal norms created out of nothing. Traditional constitutional economists, such as James M. Buchanan, consider the constitution as representing principles of rational choice and individual preferences transferred into a set of social rules.[197] This research, however, concedes the limitations of such an approach. As Paul J. DiMaggio & Walter W. Powell described, we need to ask 'where the preferences come from' and recognise the limitations of rational choices, such as opportunism, imperfect or asymmetric information, and costly monitoring.[198]

B. Guy Peters describes how formal and informal institutions have bound individuals [199], but that 'individuals do not choose freely among institutions, customs, social norms, or legal procedures'.[200] The process of 'sedimentation' implies how 'current practices are built on the past and that beneath current practice in an organization there may be layers of values and understandings left from earlier times'.[201] Another relevant process is the process of 'socialisation', where institutions modify the ideas, beliefs and values of the members of the surrounding society, including ideas of what is acceptable and legitimate.[202] To summarise, institutions sediment the values of different times, and institutions socialise the members of the surrounding society to those values. Institutions do change with changes in the values of the surrounding society. However, the process of institutional change is slowed down by the process of socialisation. There may also be tension between institutions and society. In that case, if the institution does not change, it may lead

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[195] Ibid.

[196] Ibid.

[197] Teubner 2012, 33.

[198] DiMaggio & Powell 1991, 9.

[199] Peters 2001 [1999], 1.

[200] Ibid., 9–10.

[201] Peters 2001 [1999], 17 & 104. On the process of sedimentations, see also Tuori 2000, 220–229.

[202] See Taylor-Gooby 2009; Hooghe 2001; Chilton 2004; Alexy 1989.

to an institutional crisis. According to Andrew Heywood the survival of political regimes and legal regimes is dependent on institutions being able to react to changes in the social environment.[203]

In 1215 a contract between the absolute and the merchants guaranteed bourgeois and aristocrats exercising trade to arrive, stay, travel in and leave England freely and unharmed. This contract was referred to as *Magna Carta Libertatum,* the Great Charter of Freedom. In 1303, the *Carta Mercatoria* granted West Europe, German, Lombard and Tuscan merchants the freedom to deal wholesale, export, and lodge wherever they pleased.[204] Douglas Heckathorn and Steven Maser have aimed to explain how modern constitutional law has developed from societal contracts like *Carta Mercatoria* or *Magna Carta*.[205]

'The Instrument of Government', established in England in 1653, has been described as the first written constitution. It was, in fact, a treaty between the sovereign ruler and the owning class. The 'Instrument of the Government' established rights for the owning class and limitations for the power of the sovereign.[206] Up until then, the legal system built on the traditions of Ancient Rome, the *corpus iuris civilis*. Still today, many legal systems are based on Roman tradition. Roman ideas of public deliberation and decision-making resurrected after the Middle Ages are still an incremental part of the political constitutions of Western civilisations. These ideas have carved themselves into the legacy of the revolutions in England, France and America in the 1600s and 1700s.[207]

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[203] Heywood 1994, 97.

[204] Arnold-Baker 2001, 249. See also Wiener 1999, vii.

[205] Heckathorn & Maser 1987. Stefan Voigt (1999) continued to develop this theory. Voigt's historical account includes the formation of *Magna Carta*, but also the societal change that took place in Poland in 1980s. Similar accounts have been rendered by Michel Foucault (2007), who described the circumstances of price regulation of grain in 17th century England. Many attempts to demand legal recognition and establish rights by the suppressed have ended in 'bloodbath', as described by Jukka Kekkonen (2009, 122).

[206] Loughlin 2007, 34. In 1215 a contract, or rather a collective agreement between the absolute and the merchants guaranteed the rights of bourgeois and aristocrats, those exercising trade, to arrive, stay, and travel in, as well as leave England freely and unharmed. In 1303, the *Carta Mercatoria* exempted West Europe, German, Lombard and Tuscan merchants from municipal dues for paving, bridges and walls and granted freedom to deal wholesale, to export and to lodge where they pleased. (Arnold-Baker 2001, 249. See also Wiener 1999, vii.)

[207] Critical evaluation of the birth of the 'sovereignty of the people' is given by Martin Loughlin, who suggests that the term was used by the elites to legitimise the transfer of power from God given sovereign rules to the elites themselves. (Loughlin 2012 [2008], 34.) There were also groups which aimed to prescribe a constitutional system based on popular sovereignty. 'The Levellers' outlined the framework of modern constitutional powers, with democratic government and certain sovereign rights

Jürgen Habermas, on the other hand, traces the division between the public and private spheres to the interests of the bourgeoisie of the late 17th and early 18th centuries.[208] The scope of the private sphere is the 'morally neutralized domain of private actions'. In the private sphere, 'private individuals may legitimately exercise free choice'[209]. The legal historian Jukka Kekkonen has highlighted the importance of the historical development of legal culture in explaining the varieties between legal systems.[210]

This demonstrated how the establishment of legal systems reflects the layering of historical events. This observation also applies to the development of corporations and their role in society social role.[211]

> The idea of corporations as legal entities has developed through time. Already in 15th century Italy, corporations have had significant informal power: The banking sector of Florence was a prominent societal actor at that time.[212] Corporations were, however, entities formed by contractual relations between private entities. Businesses have, however, always been important for the rulers as well. In 1215, *Magna Carta* guaranteed bourgeois' and aristocrats' rights to exercise trading, arrive, stay, travel in and leave England freely and unharmed. With *Carta Mercatoria* (1303), King Edward I granted foreign merchants the freedom to move and trade.
>
> With the founding of the new world, the States of the old world became directly invested with the chartered companies aiming to bring the riches of the new world to Europe. The risky endeavours to America, with the potential riches, also enhanced the development of joint-stock companies and selling of shares in the open market. The process of colonising the new world, such as building a railway, further enhanced the development of limited liability companies. Limited liability was, at first, reserved to companies engaged in public work, but during the 1800s, this was gradually changed by a movement that began in Massachusetts. However, the old world was more reluctant to liberate corporations. Britain implemented regulatory control over industries, and Germany involved corporations in social policies, established a pension system and formalised the status of workers in company decision-making.
>
> The fall of the Soviet Union in 1991 accelerated the liberalisation that had begun in the US during the late 1970s and spread to Europe *via* the UK. The failure of socialism resulted in drastic changes in the relation between the States and business. The

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for the people, including mechanisms of accountability, relations of trust and division of power, and extending the franchise to all individuals except women, children, criminals and paupers. (Loughlin 2007, 36.)

208 See Habermas 1996.

209 Habermas 1984, 259.

210 Kekkonen 2009, 4.

211 See also above, Ch. 1.2.3.

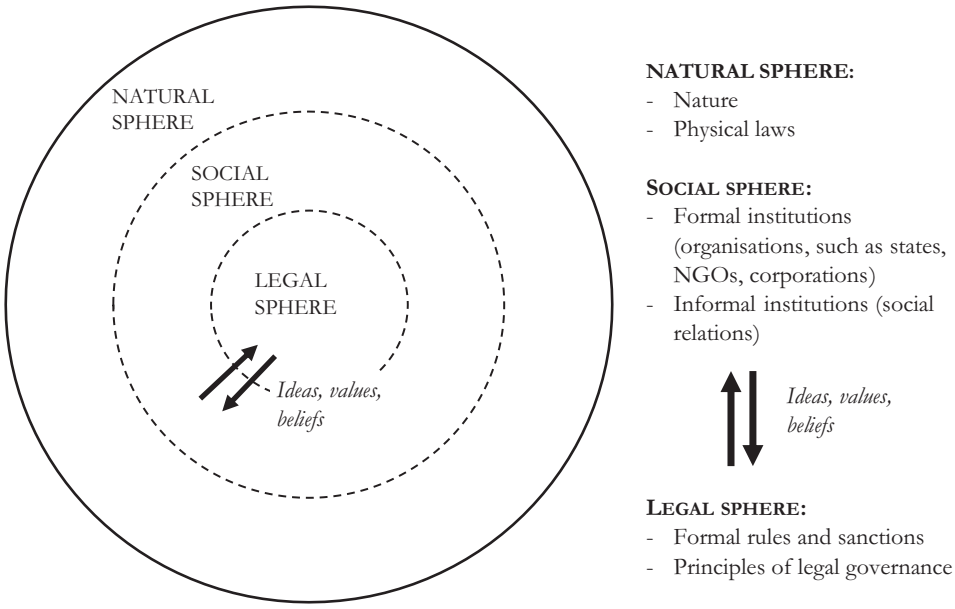
212 Micklethwait & Wooldridge 2003, 27–28.

> modern 'idea' of corporations has largely stripped them from any other social function than to do what they do, which is *business*.

The ideas embedded into the legal sphere influence society through processes of sedimentation and socialisation.[213] These ideas, beliefs and values then constitute the concepts and norms by which the legal rules and norms are understood and legitimise and limit the exercise of legislative power.[214]

Nevertheless, modern Western legal systems are based on the idea of *legal positivism*, legal change through conscious legislative acts. Legal rules are changed through legislative processes. The legislative process always involves the use of power. The power used to change legal rules is primarily legislative, but other types of social power influence legislation, including economic and political power. By determining the legal rules and legal concepts, those using legislative power can influence the ideas, beliefs and values of the members of the surrounding society. (Figure 5.) However, this research focuses on how societal ideas, beliefs and values create conditions and limitations for legal powers of both public and private law entities, focusing on corporate entities as autonomous legal persons. Ideas, beliefs

Figure 5. Legal systems as social institutions: The interrelation of social and legal spheres.



[213] See Tuori 2000, 217–233.

[214] Tuori 2000, 219; 220–233. See also Peczenik 1983, 2; 4.

and values may be described as *static* and *dynamic principles*, sources of *principled* and *pragmatic arguments*, both *pro* and *con* legal intervention.

3.1.2 Static & Dynamic Principles

Values are important, especially when recognising causes both *pro* and *contra* public intervention. Values as principles are not a means to an end but an end in themselves. Even though social values are continually changing, as principles they are *static*. They reflect conceptions about ethics and morality, where the decision-making and behaviour are not *per se* determined by the outcome nor the chance of success.[215] Static principles reflect fundamental social values and beliefs. In liberal legal systems, they reflect the values of individual freedom and autonomy, as well as solidarity and other collective values. The collective values include, for example, the protection of national interests. Static principles produce principled arguments for (positive argument) and against (negative argument) public intervention[216]. In the case of divergent static principles, the principles are weighed with and against each other to determine which is more important at that time and situation. Societies may also have objectives originating partially from social values.

Principles reflecting ideas and beliefs about the efficacy of means in relation to objectives, on the other hand, are *dynamic* principles. They produce pragmatic arguments for public intervention, both negative and positive. Pragmatic arguments involve case-by-case evaluation of the various choices in relation to the situation.[217] Dynamic principles reflect ideas and beliefs about individual decision-making and behaviour. They guide the selection of the most efficient legislative and other policy measures and establish the realm of possibilities in terms of efficacy.

As guiding principles, dynamic principles are used the same way as principles of nature. However, while the principles of nature represent ideas and beliefs about the

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[215] Heiskala 2000, 53–54. Neither do they require normative or even empirical support, see Perelman 2000, 1407.

[216] Aarnio 1978, 202.

[217] Kolehmainen 2016, 117. Dynamic principles in themselves can be just as ideological as values, but at least convey the idea of reaching goals. They are dynamic, even if they are bound by ideas and beliefs. The dynamic principle and the static principle can be the same in content. They can be distinguished by asking whether the principle described a goal or a mean. Because dynamic principles are bound to anticipated effects and not to intrinsic values, in principle they can change if the desired effects are not produced. However, dynamic principles can be relatively permanent, even if their effectiveness is questionable, if there is strong ideological support behind it. However, dynamic principles can be challenged by relying on facts, or interpretations of causes and effects.

behaviour of substance, dynamic principles represent ideas and beliefs about the behaviour of individuals and groups of individuals, including ideas and beliefs about the functioning of society and the market.[218]

The dynamic principles act in the framework of static principles. Static principles, hence, establish the *realm of possibilities in terms of legitimacy*. Considering all possible measures of legal governance public power can take, the realm of legitimacy rules out those not consistent with fundamental social values and beliefs. These values legitimise and limit the exercise of legislative power. Pragmatic arguments concerning efficacy may not override principles or arguments that involve fundamental values, at least without possible issues of legitimacy that could undermine the survival of the legal and social system.

Static and dynamic principles may be written into legal norms, and indeed, often are.[219] Constitutional norms and human rights law, for example, reflect fundamental social values. Static principles recognised by the Union stem from the common constitutional traditions and international obligations of the Member States.[220] However, the Union adds a layer of dynamic principles. The dynamic principles of the Union include the principles of European Competitive Social Market Economy (ECSME). As further elaborated in Chapter 7, the principles are (1) stable economic growth and price stability, (2) market competition and (3) steering the economy in a socially acceptable direction by laying down common rules and avoiding direct intervention.[221] Together, the static and dynamic principles embedded in the EU legal system create the realm of possibility for legitimate and efficient public management. These two realms, legitimacy and efficacy, contain the principles of

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[218] Both principles of nature and principles representing ideas about human decision-making and behaviour are working hypotheses. Their validity is always uncertain, especially regarding ideas and beliefs about the behaviour of individuals and principles of functioning of society and market. Competing ideas and interpretations are wide-ranging. The dynamic principles of the ECSME reflect the hegemony of the market, which itself also includes a variety of schools.

[219] The traditional liberal values expressed by civil and political rights are characteristically *a priori* values. Traditional perception of constitution as constraining public power produces fundamental critique towards both evaluation of laws according to their outcomes, as well as towards pragmatic use of formal rules. The use of substantive and procedural norms to promote certain values and objectives has been fundamentally criticised by Max Weber, according to whom such rationality, including economic rationality, undermined the autonomy of law and its systematic (formal) rationality (See Tuori 1990, 17). Immanuel Kant as a noted legal and general philosopher, has rejected any use of individuals as instruments for anything as against the idea of human dignity (See Kant 1886, 8–10). Also, according to Kant, good will is good in itself, and cannot be evaluated in terms of usefulness or utility (Kant 1886, 4). On the a *posteriori* value of artificial entities, see e.g. Cappuro 2012.

[220] Article 2 TEU; C-402/05 P & C-415/02 P Kadi [2008] ECLI:EU:C:2008:461.

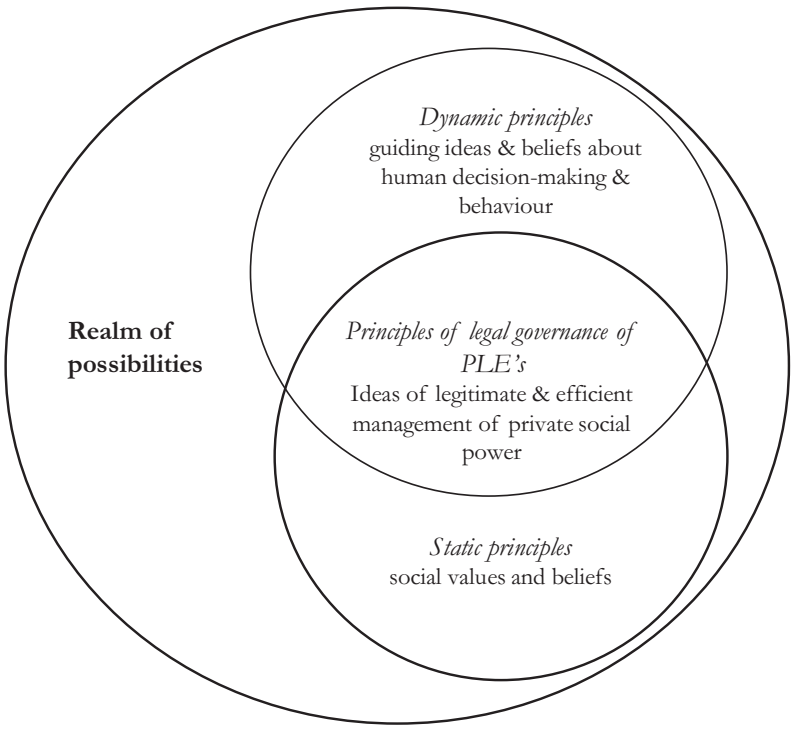
[221] See below Ch. 6.

legal governance of private law entities generally and corporate entities in particular. (Figure 6.)

This research interest is in public management and particularly the legal governance of corporations as legal entities in the institutional framework of the European Union. It is assumed that the legal governance of corporate entities (CEs) reflects ideas about both legitimate objectives and efficient means, including ideas about how corporations should behave and to what end. The research aims to recognise the static and dynamic principles embedded in the EU legal system that influence the legal governance of CEs. While recognising that static and dynamic principles embedded into the legal system reflect societal ideas, beliefs and values, the research focuses on the legal sphere, that is, on the legal powers and legal governance of corporations as legal entities.

Nevertheless, the epistemological position of the research is that studying legal phenomena can also shed light on the underlying societal ideas, beliefs, and values,

Figure 6. Realms of possibilities, legitimacy and efficacy of legal governance of corporate entities.



which may then serve as a basis for future discussion on the public management of corporate entities.[222]

3.2 Research Method, Process & Data

The objectives of the research are (1) to develop a model for the legal personhood and legal powers of corporate entities applicable in the EU; (2) to analyse the impact of the secondary legislation adopted by the EU during the financial and economic crisis on the legal powers of corporations; and (3) by applying the models to corporate legal personhood and legal power, to recognise the key variables determining the legal powers and legal relations of corporate entities in the framework of EU legal system.

(1) In order to develop models for legal personhood and the legal powers of corporate entities, Part II systematises relevant primary provisions of EU law. The basis of the legal powers of private law entities generally and corporate entities in particular is established by the primary legislation and general principles of the European Union.

The primary legislation consists of consolidated versions of the Treaty on European Union (TEU), Treaty on the Functioning of the European Union (TFEU), and the European Charter of Fundamental Rights of the European Union (CFR). The Treaty on European Union and the Treaty on the Functioning of the European Union are successors to the Treaty of Maastricht (1992) as amended by the Treaty of Lisbon (2007).[223] They came into force on 1 December 2009. Treaty on the Functioning of the European Union was amended in 2011 to establish a stability mechanism between the Member States whose currency is the euro to safeguard the stability of the euro area. (Article 136(3) TFEU.)[224]

General principles of the EU law were developed by the Court of Justice of the European Union through its case law. General principles include respect for fundamental rights, proportionality, legal certainty, equality before the law and subsidiarity. These legal principles reflect European values and the common constitutional heritage of the Member States. On the other hand, principles of direct

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[222] See below Ch. 10.

[223] The objective of the Treaty amendment was to make EU more democratic and more efficient in responding to global problems, such as climate change. Main changes included enhancing the powers of the European Parliament and establishment of citizens' initiative.

[224] European Council Decision 2011/199/EU, OJ L 91, 6.4.2011, p. 1–2.

effect and primacy of EU law, as legal doctrines, are the upshot of ensuring the efficacy of EU law.[225] The principle of direct effect may apply in both horizontal and vertical relations. Moreover, the principles of direct effect and primacy form the basis for other principles developed by the CJEU, particularly in the field of European economic law. These include the principles of equal treatment, non-discrimination, mutual recognition, proportionality and transparency.[226]

The research systematises EU law regarding the legal powers and legal relations of private law entities generally and corporate entities in particular. First, it gathers key Treaty provisions, Charter provisions and general principles of the Union law affecting the legal powers and legal relation. Next, it utilises a reviewed version of the typology developed by Wesley Newcomb Hohfeld to formulate a model of corporate legal power and legal relations.[227] The research then commences to formulate a theoretical model of corporate legal personhood applicable in the EU legal system. The model utilises three competing models of corporate legal personhood, *i.e.*, the 'artificial entity model', 'aggregate theory' and the 'real entity model'.[228] Through the models of corporate legal personhood and systematisation of their legal powers, the research aims to offer a common framework for further discussion on the legal governance of corporate entities.

While legal systematisation aims to present legal norms in systematic form and order, legal interpretation aims to answer the question about the content of the law by filling gaps and resolving conflicts. As described by Seppo Sajama, legal interpretation relies on general rules of interpretation developed by German legal scholar, Friedrich Carl von Savigny in '*System des heutigen Römischen Rechts. Bd. 1'* (1840). These general rules of interpretation are grammatical interpretation, genetic interpretation, systematic interpretation and teleological interpretation.[229]

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[225] Case 26/62 *van Gend & Loos* [1963] ECLI:EU:C:1963:1; Case 6/64 *Flaminio Costa v. ENEL* [1964] ECLI:EU:C:1964:66. See also C-106/77 *Simmenthal* [1978] ECLI:EU:C:1978:49; C-106/89 *Marleasing* [1991] ECLI:EU:C:1990:395.

[226] See C-325/91 France v Commission [1993] ECLI:EU:C:2006:588; C-57/95 France v Commission [1997] ECLI:EU:C:1997:164; C-303/90 France v Commission [1991] ECLI:EU:C:1991:424.

[227] See above Chs. 2.1.2 & 2.1.3.

[228] See above Chs. 2.2.1 & 2.2.2.

[229] Sajama 2016, 31. Grammatical interpretation aims to find the content of law through the wording of the legal provisions. Genetic interpretation aims, especially in cases where grammatical interpretation does not produce a satisfactory answer, to ascertain the intention of the legislature. The intention is recognised by studying the preparatory work for the legislation and its legislative history. Systematic interpretation considers other relevant provisions in addition to the particular provision studied. According to Sajama, the original provision finds its content from other legal provisions and the coherence of the legal system. Finally, teleological interpretation selects from all possible interpretation the one which maximises utility. (Ibid, 31–33.)

Interpretation is required when legal norms are abstract or contradictory, as is often the case with the EU primary legislation. From the general rules described by Savigny, systematic and teleological interpretation plays a significant role in EU law. In *CILFIT* judgement from 1982, the Court outlined how 'every provision of Community law must be placed in its context and interpreted in the light of the provisions of Community law as a hold, regard being had to the objectives thereof'.[230] Hence, the context of interpretation in the EU law is the Union's objectives expressed in primary legislation and general principles.[231] Teleological interpretation to *effet utile* approaches norms from the perspective of the meaning and purpose.[232] In this research, this approach entails considering the possible meaning and purpose of norms establishing legal powers for and regulating the legal relations of private law entities generally and corporate entities in particular.

Teleological interpretation also approaches norms from the perspective of choosing the proper means to achieve the desired objectives in the real world.[233] Consequently, teleological interpretation requires extra-judicial resources.[234] In this research, extra-judicial resources include ideas, beliefs and values regarding legitimate and efficient governance. The objective is to recognise the static and dynamic principles embedded in the EU primary legislation and their influence on the legal governance of private law entities generally and corporate entities in particular.[235]

While primary legislation provides the principles and objectives of the European Union, secondary legislation provides the body of law. Secondary legislation includes regulations, directives, decisions, recommendations and opinions.[236] Secondary legislation is essential for the implementation of the principles and objectives established in the Treaties. Secondary legislation is, however, in a constant state of flux. The surface-level regulation changes frequently. The changes influence the legal powers and legal relations of private law entities. Because of this, the formulation of models on corporate legal personhood and powers focuses on primary legislation and general principles. These models provide the basis for a detailed study of how

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[230] Case 283/81 *Srl CILFIT and Lanificio di Gavardo SpA* [1982] ECLI:EU:C:1982:335, Summary of Judgement, Groun,ds, [20].

[231] Talus & Penttinen 2016, 242.

[232] Ibid., 241.

[233] Sajama 2016, 33; 35.

[234] Ibid., 33.

[235] See below Ch. 6.

[236] Legislative acts of the Union, see Part 6, Title I, Chapter 2 TFEU.

the EU's measures to promote its principles and pursue its objectives during a crisis period have affected corporate entities.

(2) To study the impact on corporations of the measures adopted in response to the social challenges posed and perpetuated by the crisis, Part III systematises and analyses an extensive amount of the secondary legislation adopted by the EU to respond to the financial and economic crisis. The period examined starts from the first measures drafted by the Economic and Financial Affairs Council (ECOFIN[237]) in October 2008, when the severity of the economic recession became apparent. Most EU Member States passed the first wave of the recession in 2010. However, a follow-up recession in 2010–2013 affected 27 of the 50 European countries. The systematic review of the measures adopted will end with measures adopted in 2015, when most of the EU Member States had recovered from the recession, with the exceptions of Cyprus, Italy, and Croatia.

Secondary legislation includes legislative acts (Article 289 TFEU), delegated acts (Article 290 TFEU) and implementing acts (Article 291 TFEU). Legislative acts are used to enforce Treaty provisions. They include regulations, directives, decisions and inter-institutional agreements. Regulations have a general application, and they are binding on and directly applicable to the Member States. Directives are binding 'as to the results to be achieved' but leave the Member States free to decide the 'form and methods'. Decisions in their entirety are binding on those addressed. The Treaty on the Functioning of the European Union also recognises recommendations and opinions which have no binding force. (Article 288 TFEU.)

The research also addresses policy material, especially those leading to the adoption of any legal instruments. Such policy material also includes legislative proposals and other Communications adopted by the European Commission. Legislative proposals are, however, the result of a long process. Therefore, the research also coversextends to some of the Policy Strategies[238], Green Papers[239], White Papers[240] produced and Impacts Assessments conducted by Commission

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[237] The Economic and Financial Affairs Council, or ECOFIN, is composed of the economics and financial ministers of the EU Member States.

[238] See Craig & de Búrca 2015, 148.

[239] 'Green Papers are documents published by the European Commission to stimulate discussion on given topics at European level. They invite the relevant parties (bodies or individuals) to participate in a consultation process and debate based on the proposals they put forward. Green Papers may give rise to legislative developments that are then outlined in White Papers.' Source: Green paper: https://eur-lex.europa.eu/summary/glossary/green_paper.html (Accessed on 1 January 2019).

[240] 'European Commission White Papers are documents containing proposals for European Union (EU) action in a specific area. In some cases, they follow on from a Green Paper published to launch

staff[241] preceding any proposals. Policy materials are also necessary when applying the model of corporate legal personhood and general principles of their legal governance to the crisis measures.[242]

The research moreover addresses the Preambles of othe adopted legislation. While Preambles and policy documents lack official binding force in the enforcement of regulation, they disclose the objectives and grounds for legislative decisions taken, including decisions on whether to use legal or non-legal instruments.[243] As described by Paul Craig and Gráinne de Búrca, '[t]he EU has a number of legal and non-legal instruments that are used to attain Union objectives'.[244] Non-legal instruments include recommendations, opinions and soft law.[245] The research focuses on legal and other policy measures adopted by the European Parliament, the European Council and the European Commission.

The Commission itself described its role in crisis management as follows:

> In tackling the crisis, the Commission has taken a leading role in preserving the single market against emerging protectionist tendencies and fragmentation according to national borders, especially in the banking sector; in overhauling EMU's economic governance to address the weaknesses of economic surveillance and in putting forward important legislative proposals to initiate the reform of financial sector supervision, in ensuring EU-level coordination and oversight of bank rescue and in spear-heading support to the real economy under the European Economic Recovery Programme.[246]

The vast number of official documents was studied using textual analysis. Specific keywords recognised from the primary legislation and encountered when performing preliminary research on the legislative and non-legislative material were then searched throughout the extensive body of official material collected.[247]

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a consultation process at EU level. The purpose of a White Paper is to launch a debate with the public, stakeholders, the European Parliament and the Council in order to arrive at a political consensus.' Source: White paper: https://eur-lex.europa.eu/summary/glossary/white_paper.html (Accessed on 1 January 2019).

[241] Impact Assessments 'identify and assess the problem and the objectives pursued' and evaluate and inform about the impacts of the proposals. (Craig & de Búrca 2015, 149.)

[242] See e.g. below Ch. 8.3 & 9.

[243] See e.g. Siltala 2003, 258–260.

[244] Craig & de Búrca 2015, 105.

[245] Ibid., 109.

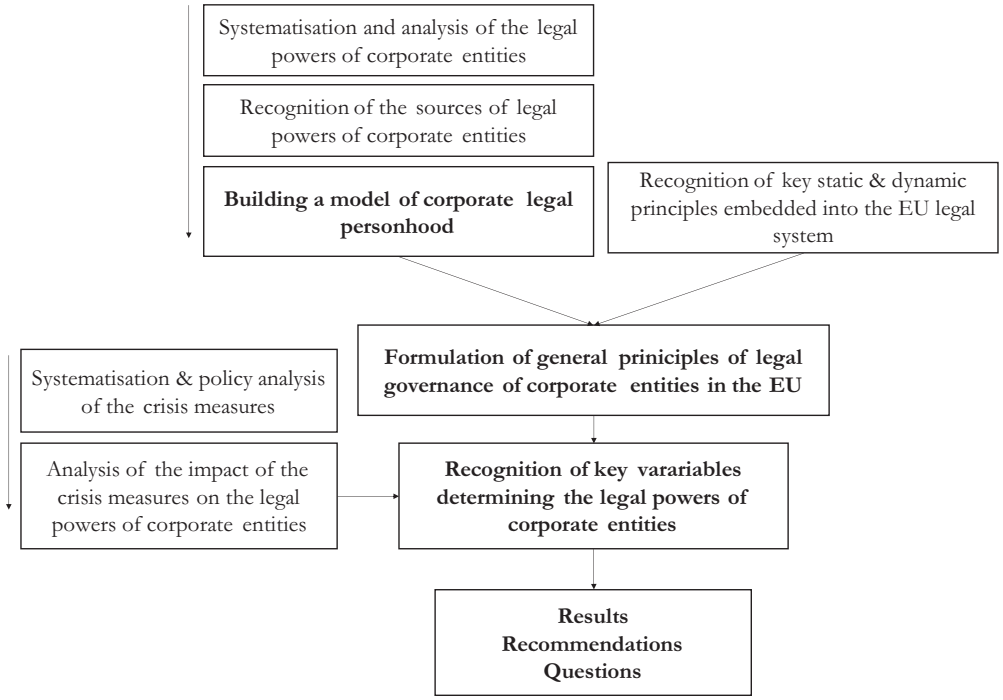
[246] COM(2012) 777 final/2, 4.

[247] Key words included words such as '(economic) growth', '(economic) stability', 'competition/competitiveness'; 'solidarity', 'sustainability', 'SME(s)/small and medium-sized

The research uses English translations of the material.[248]

The policy analysis utilises the classification of policy instruments used by contemporary public management research, which divides policy tools into *regulation*, *economic means* and *information*. These policy instruments are also referred to as 'stick, carrot, and sermon'.[249] The legal analysis on the impact of these measures on corporate entities, on the other hand, utilises the reviewed Hohfeldian typology to

Figure 7. Research process.



business/ social enterprises/entrepreneurship'; '%/GDP/GDI/€/euro'; 'fundamental rights', 'human rights', and so on. While in this research only manual analysis of text is performed, it is conducted with the awareness of possible alternative methods that applies technologies for quantitative analysis, data-analysis and statistics. See e.g. Quaresma & Gonçalves 2010; Wyner, Mochales-Palau, Moens & Milward 2010; Francesconi et al 2010. The use of statistical methods in analysis, see e.g. Vuorela 2016.

[248] The CJEU uses different language versions of primary and secondary legislation when interpreting EU law. (Case 283/81 *CILFIT* [1982] ECLI:EU:C:1982:335, Summary of Judgement, Grounds, [19]. See Talus & Penttinen 2016, 237–239.) The language version of the material studied in this research is English. Although the primary reason for this is practical, the research does not go into such details that the language version is expected to create a significant difference.

[249] See below Ch. 7.

recognise the impact of the crisis measures on the legal powers and legal relations of corporate entities.[250]

(3) The objective of Chapter 9 is to recognise the key variables determining the legal powers and legal duties of corporate entities as autonomous legal entities in the EU. It sums up the findings made in the previous chapters and builds upon them to recognise key factors influencing the legal powers of corporate entities during the crisis. It studies how the crisis measures reflect the legal personhood and general principles of legal governance of corporate entities. It recognises the role of static and dynamic principles and the principled and pragmatic arguments stemming therefrom in the legal governance of corporate entities between 2008 and 2014 and also in early 2015. It finalises the study by recognising the key judicial and extrajudicial factors determining the legal powers and legal relations of corporate entities as autonomous legal persons in the EU and discusses the applicability of the results.

As outlined above, Chapter 10 discusses the contribution of the findings, concedes the limitations of the research at hand and makes recommendations for future research. Finally, Chapter 11 provides conclusions with a summary of the results and outlines the key contributions. (Figure 7.)

[250] See below Ch. 8.

PART II THEORY FORMULATION

4 LEGAL POWERS OF PRIVATE LAW ENTITIES IN THE EU

This chapter argues that natural and legal persons hold legal powers in the European Union. It systematises the legal powers of private law entities in the framework of the European Union's primary legislation. The systematisation produces seven categories of legal rights and liberties: (a) internal market liberties, (b) internal market rights, (c) fundamental market liberties, (d) fundamental market rights, (e) solidarity market rights, (f) fundamental non-market liberties and (g) fundamental non-market rights. The systematisation also distinguishes between three sources of legal duties: (1) Union objectives, (2) general interests and (3) the liberties and rights of others. The chapter analyses the legal powers of private law entities considering key provisions and principles. The analysis utilises the reviewed Hohfeldian typology. This chapter presents the following arguments: That internal market liberties are privileges while fundamental market liberties are general liberties; that internal market rights and solidarity market rights are particular rights; that fundamental market rights are general rights and; that fundamental non-market liberties and rights are general liberties and rights.

4.1 Introduction

The research aims to understand the nature and role of corporations as legal entities in the EU legal system. As stated in Chapter 1.2, previous legal research does not provide a comprehensive systematisation of the legal powers of corporate entities in the European Union. While Peter Oliver studied the case law of CJEU to systematize what rights recognised by the Union appertain to corporations, the results were inconclusive. According to Oliver, 'companies may enjoy fundamental rights for two reasons: because it is essential to protect their own interests; and because it is necessary for the sake of the public interest'.[251] Oliver argues that corporations enjoy the fundamental rights essential to their 'functions and purpose'. To truly understand the legal powers of corporations, it is necessary to distinguish further what constitutes 'the interests of companies', the 'functions and purpose of companies' and 'necessity for the sake of public interest'. The research aims to

[251] Oliver 2015, 694.

provide systematisation of the legal liberties, rights and duties of corporate entities. It aims to ascertain whether and how the 'function and purpose' of corporations is reflected in the legal capacity of corporate entities compared to natural entities.

The Treaty on European Union (TEU), the Treaty on the Functioning of the European Union (TFEU) and the Charter of Fundamental Rights (CFR), as well as the general principles of Union law, recognise legal powers for private law entities. However, the Treaty articles often fail to specify the legal subjects on whom they confer the legal powers. As a result, the legal subject of the legal powers frequently remains unrecognised and undefined . As the EU primary legislation does not distinguish between natural and legal persons, the research will first consider a *general case of private law entities*. General case refers to the legal powers of private law entities recognised in the EU primary legislation, irrespective of whether belonging to a natural or a legal person.

This chapter argues that private law entities, both natural and legal, hold legal powers in the European Union. It introduces the key features of the European Union's legal system (Chapter 4.2). It then proceeds to systematise the legal powers of private law entities (PLEs) in the framework of the European Union's primary legislation (Chapter 4.3). The systematisation yields seven categories of legal rights and liberties: (a) internal market liberties, (b) internal market rights, (c) fundamental market liberties, (d) fundamental market rights, (e) solidarity market rights, (f) fundamental non-market liberties and (g) fundamental non-market rights. The systematisation also distinguishes between three sources of legal duties: (1) Union objectives, (2) general interests and (3) the liberties and rights of others. The chapter analyses the legal powers of private law entities considering key provisions and principles.

The analysis utilises the model of Hohfeldian typology reviewed as presented in Chapter 2.2.2 to recognise the legal powers and legal relations of PLEs recognised in EU primary legislation. The analysis concludes that

internal market liberties are *particular liberties, i.e. privileges*

fundamental market liberties are *general liberties*

that internal market rights and solidarity market rights are *particular rights*

that fundamental market rights are *general rights* and

that fundamental non-market liberties and rights are *general liberties and rights*.

This systematisation and analysis provides the groundwork for studying the special case of corporate entities as legal persons.[252]

4.2 The Law of the European Union

When the Treaty of Maastricht (1993) established the European Union, the European Community remained the only area where the Union had legal personality and legal autonomy. Despite the failed attempt to adopt a Constitutional Treaty[253], this research approaches the EU as a constitutional legal system. The constitutive treaties include many elements and features characteristic of a constitution, establishing a constitution-based legal system based on a hierarchy of norms, division of power and list of rights.[254]

The constitutive treaties establish a hierarchy of norms placing the Treaty on European Union, Treaty on the Functioning of the European Union, and the Charter of Fundamental Rights at the top of the hierarchy, while placing the general principles developed by the Court of Justice of the European Union (CJEU) on the second tier of that hierarchy. These principles include the principles of subsidiarity, proportionality, legal certainty, *et cetera*.[255] TEU and TFEU also establish a division of power between national and supranational institutions and between different

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[252] See below Ch. 5.

[253] The Constitutional Treaty of the European Union, signed in 2004, but left unratified, was turned down by the French and Dutch referenda. One objective of Treaty reform was to bring hierarchy and order into fragmented legal system represented by the Pillar Structure. (Dunoff & Trachtman 2009, 8.) Another underlying reason behind constitutionalisation was the attempt to increase the legitimacy of the European economic, legal and political system. (See e.g. Tuori 2007, 49–50; Tuori 2010, 13.) These objectives were also pursued in the Lisbon Treaty, but the Treaty confined itself to modifying existing Treaties. It also lacked the symbolic references to Federal State included in Constitutional Treaty, such as an anthem and 'national day'. On previous attempts to solve the issues of integrations with Constitutional Law, such as the 1953 proposition to establish a European Political Community, rejected by the French, and the 1994 proposition for a resolution for a Constitution of European Union adopted by the European Parliament, see e.g. Jääskinen 2001.

[254] Ojanen 2010, 2. For more on European constitutionalism, see e.g. Nieminen 2004; Longo 2006; Tuori & Sankari (eds) 2010; Dobner & Loughlin (eds) 2010); Jääskinen 2001.

[255] Craig & de Búrca 2015, 111. The principles of subsidiarity and proportionality are currently included in Article 5 TEU. According to Article 5(3) TEU, 'Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States [--]'. According to Article 5(4) TEU, 'Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties'. The use of these principles is laid down in a Protocol on the application of the principles of subsidiarity and proportionality.

supranational institutions.[256] It also includes a comprehensive list of rights in the form of the Charter of Fundamental Rights (CFR) adopted in 2000. However, the cornerstones of the modern Union were in place long before the Treaty of Maastricht. These cornerstones are essential in understanding the legal powers of corporate entities.

Following the European Coal and Steel Community established in 1951 by the Belgium, France, Germany, Italy, Luxembourg and Netherlands, the Treaty of Rome (1957) established the European Economic Community (EEC) and the European Atomic Energy Community (Euratom). The Treaty of Rome established the principles of fundamental market freedoms and competition law. According to *Kaarlo Tuori*, these principles constitute the first layer of the European economic constitution.[257]

The 1957 Treaty establishing the European Economic Community contained provisions on the free movement of goods, the abolition of restrictions on the free supply of services (Articles 59–66 EEC), aims to affect the free movement of workers, freedom of establishment (Articles 52–58 EEC) progressively and, finally, free movement of capital (Articles 67–73 EEC). Paul Craig and Gráinne de Búrca described the articles on the free movement of capitalas 'less peremptory than those applicable to free movement of goods, workers, services, and establishment'[258]. However, the free movement of capital was about to become a fundamental principle in the European Monetary Union (EMU).[259]

According to an evaluation issued by the Commission of the potential benefits and costs of forming an economic and monetary union, published in 1990, one market needs one currency.[260] Moreover, establishing a single currency lowered the transaction costs created by multiple currencies[261] and enabled the free movement of capital required common macroeconomic policies. With its provisions on the Economic and Monetary Union (EMU), the 1992 Treaty of Maastricht added a second layer to the European economic constitution. This layer addressed macroeconomics issues, such as price stability and its primacy over national fiscal

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[256] See Title I TFEU, 'Categories and Areas of Union Competence'.

[257] See Tuori 2012, 2; 4; 8.

[258] Craig & de Búrca 2015, 721.

[259] See History of Economic and Monetary Union,
http://www.europarl.europa.eu/factsheets/en/sheet/79/history-of-economic-and-monetary-union (Accessed on 1st August 2019).

[260] See Commission of the European Communities 1990, 9.

[261] Ibid., Ch. 3.

policy objectives, independence of the European Central Bank and national central banks and the Member States' fiscal sovereignty and financial liability.

The subsequent Lisbon Treaty and other amendments have not touched upon these principles.[262] Neither has the establishment of the list of fundamental rights consolidating and enshrining a broad array of rights for Europeans, nor has the strengthening of the political union changed these foundations of European economic cooperation.

Article 3(4) of the Treaty on European Union states that the Union 'shall establish an economic and monetary union whose currency is the euro'. Chapter II of the TEU further states that the European System of Central Banks (ESCB) primary objective is maintaining price stability[263]. Article 119 of the Treaty on the Functioning of the European Union states how

> For the purposes set out in Article 3 of the Treaty on European Union, the activities of the Member States and the Union shall include, as provided in the Treaties, the adoption of an economic policy which is based on the close coordination of Member States' economic policies, on the internal market and on the definition of common objectives, and conducted in accordance with the principle of an open market economy with free competition.

And

> These activities of the Member States and the Union shall entail compliance with the following guiding principles: stable prices, sound public finances and monetary conditions and a sustainable balance of payments.

The founding treaties of the EU and the supplementary secondary legislation regulate economic relations. The second layer rules govern the Member States' macropolitical decision-making as regards national economic policies. The macropolitical doctrine of stable prices, sound public finances, and a sustainable balance of payments persisted throughout the sovereign debt crisis of the 2010s. These principles steered the provision of financial aid to those Member States in economic difficulties, whether due to a sovereign debt crisis or not. In addition, these principles govern the granting of financial aid to non-Member States.[264]

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[262] Tuori 2012, 2; 4; 8.

[263] See also Article 127(1) and Article 282(2) of the Treaty on the Functioning of the European Union, the Convergence Criteria in TEU Protocol No 13 on price stability and economic growth, and Title VIII of the TFEU on the Economic and Monetary Policy.

[264] See e.g. COM/2015/0005 final). See also Macro-Financial Assistance to non-EU countries: http://ec.europa.eu/economy_finance/eu_borrower/macro-financial_assistance/index_en.htm (Accessed on 27 March 2015).

The first layer rules concern the internal market. As the competencies of the Union lie in the internal market and competition policies, the EU can have a significant influence on a national legal system. The European Union sets out fundamental norms and principles for the economic life of Europeans. The economic life-sphere is commercial in the market economy, as economic relations formally are recognised as commercial contractual relations. The principles of contractual freedom and keeping agreements (*pacta sunt servanda*) are general principles of EU law, even though the Treaty provisions do not explicitly recognise them. Contractual freedom and *pacta sunt servanda* reflect the common values and constitutional heritage of the Member States.[265] However, the chapter focuses on the non-contractual legal powers and duties of private law entities established by EU primary legislation. Some of the Treaty provisions have a *direct vertical and horizontal effect*. For example, the European Court of Justice has protected free movement against State intervention in *Viking*[266], *Laval*[267], *Rüffert*[268] and *Commission v Luxembourg*[269] by directly applying the Treaty provision. In cases such as *Defrenne*[270], *Angonese*[271] and *Mangold*[272], the European Court of Justice has established the direct horizontal effect of the principle of non-discrimination.

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[265] See e.g. COM/2001/0398 final, [27]; COM/2010/0348 final, 4.2.2, [2].

[266] C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti* [2007] ECLI:EU:C:2007:772.

[267] C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* [2007] ECLI:EU:C:2007:809.

[268] C-346/06 *Dirk Rüffert v Land Niedersachsen* [2008] ECLI:EU:C:2008:189.

[269] C-319/06 *Commission of the European Communities v Grand Duchy of Luxemburg* [2008] ECLI:EU:C:2006:588.

[270] Case 43/75 *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena* [1976] ECLI:EU:C:1976:56.

[271] C-281/98 *Roman Angonese v Cassa di Risparmio di Bolzano SpA* [2000] ECLI:EU:C:2000:296.

[272] C-144/04 *Werner Mangold v Rüdiger Helm* [2005] ECLI:EU:C:2005:70.

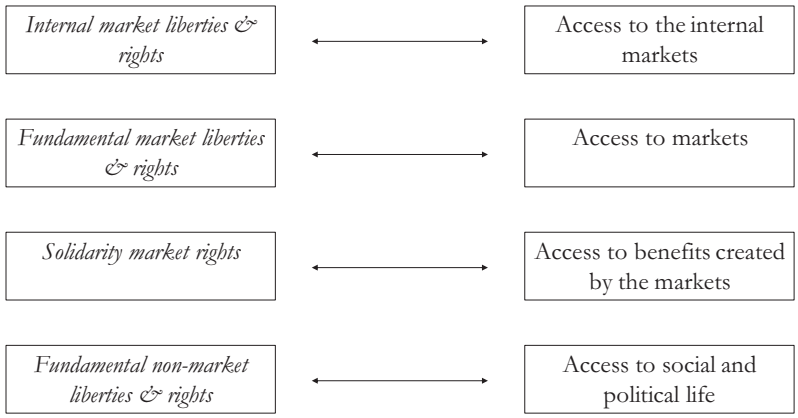
4.3 Legal Powers of Private Law Entities in the EU

4.3.1 Liberties & Rights

4.3.1.1 Preliminary

The systematisation of the primary legislation and general principles of the European Union renders seven categories of legal rights and liberties: (a) internal market liberties, (b) internal market rights, (c) fundamental market liberties, (d) fundamental market rights, (e) solidarity market rights, (f) fundamental non-market liberties and (g) fundamental non-market rights. (Figure 8; Table 6.) As legal powers are often multidimensional, any liberty or right may, in practice, fall under multiple categories.

Figure 8. Liberties and rights recognised and established by the European Union.



Internal market liberties	free movement of goods, persons, services and capital (Articles 26, 28–37 TFEU); free movement of workers (Article 3(2) TEU; Articles 4(2)(a), 20–21, 26 and 45–48 TFEU); freedom of establishment (Articles 49(1) and 55 TFEU); freedom to provide services (Articles 56 and 62 TFEU)
Internal market rights	Rights derived from principle of equal treatment, principle of non-discrimination, principle of mutual recognition, principle of proportionality, and principle of transparency
Fundamental market liberties	freedom to choose an occupation and right to engage in work (Article 15 CFR); freedom to conduct business (Article 16 CFR); right to property, including intellectual property (Article 17 CFR); freedom of contract (general principle)
Fundamental market rights	Principles of equality and non-discrimination (Article 2 and 3(3) TEU; Articles 8, 10 and 19 TFEU)
Solidarity market rights	prohibition of slavery and forced labour (Article 5 CFR); protection in the event of unjustified dismissal (Article 30 CFR); fair and just working conditions (Article 31 CFR); freedom of assembly and association (Article 12 CFR); access to information and consultation for workers and their representatives (Article 27 CFR); right to negotiate collective agreements and take collective actions to defend their interests, including strike action (Article 28 CFR); the health, safety and economic interests of consumers, and consumer rights to information, and to educate and organise themselves (Articles 12 and 169 TFEU; Article 38 CFR)
Fundamental non-market liberties	human dignity (Article 1 CFR); right to life (Article 2 CFR); right to integrity of the person (Article 3 CFR); prohibition of torture and inhuman or degrading treatment or punishment (Article 4 CFR); right to liberty and security (Article 6 CFR); respect for private and family life (Article 7 CFR); protection of personal data (Article 8 CFR); right to marry and right to find a family (Article 9 CFR); freedom of thought, conscience and religion (Article 10 CFR), freedom of expression and information (Article 11 CFR); freedom of assembly and association (Article 12 CFR); right to vote and stand as a candidate in elections (Article 39 CFR; Article 40 CFR; Article 20 TEU)
Fundamental non-market rights	Right to benefits and social services providing protection in cases such as maternity, illness, industrial accidents, dependency or old age, and in the case of loss of employment (Article 34(1) CFR); right of access to preventive health care and the right to benefit from medical treatment (Article 35 CFR); access to services of general economic interest (Article 36 CFR); cultural, religious and linguistic diversity (Article 22 CFR); rights of the elderly to participate in social and cultural life (Article 25 CFR)

Table 6. Particular and general rights in the Treaty on European Union, Treaty on the Functioning of the European Union, and the European Charter of Fundamental Rights.

4.3.1.2 (a)–(b) Internal Market Liberties & Internal Market Rights

According to Article 3(3) of the Treaty on European Union, the EU's objective is to establish an internal market. *Internal market liberties are liberties stemming from the objective of building an internal market without frontiers*. Internal market liberties include free movement of workers (Article 3(2) TEU; Articles 4(2)(a), 20–21, 26 and 45–48 TFEU), freedom of establishment (Articles 49(1) and 55 TFEU), and freedom to provide services (Articles 56 and 62 TFEU). The European Court of Justice has established the direct effect of the principle of free movement in vertical relations in, for example, *Viking*[273], *Laval*[274], *Rüffert*[275] and *Commission v Luxembourg*[276].

Internal market liberties stem from the establishment of the internal market. *Internal market rights*, on the other hand, *have a supportive role*. Internal market rights stem from the general principles derived by the Court. These principles are the principles of equal treatment, non-discrimination, mutual recognition, proportionality and transparency.[277] They are essential in terms of competition, especially concerning public procurement.

Public procurement is a process whereby public authorities, such as governments or local authorities, or the European Union, purchase services and products from companies.[278] Public procurements not following the general principles can be considered as State aid and are against EU law. The principle of non-discrimination arises from the principle of equal treatment. As the Court described in *Germany v*

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[273] C-438/05 *Viking* [2007] ECLI:EU:C:2007:772.

[274] C-341/05 *Laval* [2007] ECLI:EU:C:2007:809.

[275] C-346/06 *Rüffert* [2008] ECLI:EU:C:2008:189.

[276] C-319/06 *Commission v Luxembourg* [2008] ECLI:EU:C:2006:588.

[277] See C-325/91 [1993] *France v Commission* ECLI:EU:C:2006:588; C-57/95 *France v Commission* [1997] ECLI:EU:C:1997:164; C-303/90 *France v Commission* [1991] ECLI:EU:C:1991:424.

[278] Public procurement contracts are contracts between the contracting authority and the economic operator. The European Union sets rules for Treaty provisions, and general principles apply to public procurement contracts. Article 106(1) TFEU states how in the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaties. Article 106(1) TFEU refers to Article 18 TFEU stating the principle of non-discrimination, and Articles 101–109 TFEU on rules applying to undertakings. Otherwise, the public undertaking could be State aid, which is prohibited, unless considered as compatible with the internal market. The original conditions of allowed State aid were established by the CJEU in Altmark (C-280/00 *Altmark Trans GmbH* [2003] EU:C:2003:415). In cases where the services in question are considered as services of general economic interests (SGEIs) or as a monopoly (e.g. water) the rules on competition apply, 'in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them'. Nevertheless, 'the development of trade must not be affected to such an extent as would be contrary to the interests of the Union'. (Article 106(2) TFEU.)

European Commission (2010), the objective of the principle of non-discrimination is to ensure that 'traders, of whatever origin, have equal access to contracts put out to tender'. The principle of mutual recognition refers to the recognition of, for example, 'diplomas, certificates and other evidence of formal qualifications'. The principle of transparency aims to ensure that all potential tenderers are informed about the award criteria and their relative importance.[279] The direct applicability of these principles means that they are transformable into enforceable rights. For example, the principle of equal treatment is transformable into the right to be treated equally and the principle of transparency into the right to access information. These are internal market rights.

4.3.1.3 (c)–(d) Fundamental Market Liberties & Rights

In addition to the internal market liberties and internal market rights, this research recognises fundamental market liberties and fundamental market rights, which are key principles of the market economy, recognised irrespective of the internal market.

Article 3(3) of the Treaty on European Union states how the sustainable development of Europe is based on a highly competitive social market economy. The EU recognises a group of fundamental market liberties applied irrespective of their relation to the internal market. As an economic system based on the market, these liberties are to be respected even in the absence of possible cross-border work or business as general liberties. These include principles of free movement of goods, persons, services and capital (Articles 26, 28–37 TFEU) in the EU internal market. These fundamental market liberties mean that every person enjoys access to services and products available in the market area irrespective of their own activity in the European internal market. The rights stemming from the free movement of goods, persons, services and capital are to be distinguished from the internal market liberties of free movement of workers, freedom of establishment and freedom to provide services discussed in the previous chapter.

The EU Charter of Fundamental Rights establishes freedom to choose an occupation and the right to engage in work (Article 15 CFR), freedom to conduct business (Article 16 CFR)[280] and the right to property, including intellectual property

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[279] Case T-258/06 *Germany v European Commission* [2010] ECLI:EU:T:2010:214, Summary of the Judgment, [4].

[280] See Case 4/73 *Nold* [1974] ECLI:EU:C:1974:51; Case 230/78 Eridania [1979] ECLI:EU:C:1979:173; Case 151/78 *Sukkerfabriken Nykøbing* [1979] ECLI:EU:C:1979:4; C-240/97 *Spain v Commission* [1999] ECLI:EU:C:1999:479.

(Article 17 CFR).[281] Freedom of contract is also a fundamental market liberty recognised in EU law.[282]

While fundamental market liberties are critical in a market economy based on contractual transactions, such transactions lose their significance without fundamental market rights. The enjoyment of fundamental market liberties requires fundamental market rights. Fundamental market rights include the principles of equality and non-discrimination, declared on several occasions in the primary legislation. Article 2 TEU states how

> The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

Article 3(3) of the TEU stipulates how the Union shall combat social exclusion and discrimination and promote equality between women and men. Article 8 TFEU further enforces how the Union shall in all its activities 'aim to eliminate inequalities and to promote equality, between men and women'. Later, discrimination based on gender was augmented with discrimination based on racial or ethnic origin, religion or belief, disability, age, or sexual orientation. (Article 19 TFEU; Article 21 CFR.) Today, the principle of non-discrimination covers access to welfare systems and social security and goods and services. (Article 10 TFEU.)[283]

The objective of fundamental market rights is to protect the formal equality of contractual parties in market relations and secure everyone's access to the benefits created by the markets. Fundamental market rights contribute to competition by ensuring equal access to products, services, and employment.

There are, however, situations where formal equality is not sufficient to guarantee access to the benefits created by the market. The European Union has recognised *rights to protect those in a weaker market position*. These rights are referred to here as *solidarity market rights*.

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[281] Article 17 CFR is based on Article 1 of the Protocol to the ECHR: 'Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.' See Case 44/79 *Hauer v Land Rheinland-Pfalz* [1979] ECLI:EU:C:1979:290.

[282] See e.g. COM/2001/0398 final, [27]; COM/2010/0348 final, 4.2.2, [2].

[283] EUR-Lex: Glossary of summaries – Non-discrimination. Available at: https://eur-lex.europa.eu/summary/glossary/nondiscrimination_principle.html (Accessed on 26 November 2019).

4.3.1.4 (e) Solidarity Market Rights

Solidarity market rights stem from the objective of the EU to build social markets. (Article 3(3) TEU.) Solidarity market rights aim to protect weaker parties in contractual market relations and promote real equality instead of formal equality. Real equality means considering the uneven distribution of power between contractual parties, such as between employer and employee or business and consumer.

Solidarity market rights include the prohibition of slavery and forced labour (Article 5 CFR), protection in the event of unjustified dismissal (Article 30 CFR), and fair and just working conditions (Article 31 CFR). In addition to the prohibition of discrimination and slavery, which protect individual employees, the Charter also endorses freedom of assembly and association (Article 12 CFR), access to information and consultation for workers and their representatives (Article 27 CFR), and established rights to negotiate collective agreements and take collective actions to defend their interests, including strike action (Article 28 CFR). Article 12 TFEU, on the other hand, establishes that 'consumer protection requirements shall be taken into account in defining and implementing other Union policies and activities'. Article 169 TFEU, on the other hand, declares how

> the Union shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, and to educate and to organise themselves in order to safeguard their interests.

Article 38 of the Charter of Fundamental Rights requires EU policies to ensure a high level of consumer protection.

4.3.1.5 (f)–(g) Fundamental Non-Market Liberties & Rights

The fifth group of rights recognised in the Treaty law is the *fundamental non-market liberties*. The term 'non-market' is not synonymous with 'non-economic'. Several of the rights listed below have connections to economic life, such as the right to liberty and security, respect for private and family life and the protection of personal data. The source of these liberties can be seen as recognising the sphere of individual autonomy and democratic decision-making, complemented with social values reflected in economic, social and cultural rights.

The fundamental non-market liberties include *basic human rights* – some of which are also considered as absolute – such as human dignity (Article 1 CFR), the right to

life (Article 2 CFR), the right to the integrity of the person (Article 3 CFR), and the prohibition of torture and inhuman or degrading treatment or punishment (Article 4 CFR). Then there are civil rights, including the right to liberty and security (Article 6 CFR), respect for private and family life (Article 7 CFR), protection of personal data (Article 8 CFR), as well as the right to marry and the right to found a family (Article 9 CFR). The Charter also ensures several political rights. These rights include the freedom of thought, conscience and religion (Article 10 CFR), freedom of expression and information (Article 11 CFR), freedom of assembly and association (Article 12 CFR), as well as the right to vote and stand as a candidate in elections (Article 39 CFR; Article 40 CFR; Article 20 TEU).

Like fundamental market liberties, fundamental non-market rights strengthen fundamental non-market liberties. Fundamental non-market liberties create a sphere of individual autonomy and ensure individuals' opportunities to participate in society. They are based on the idea of formal equality. Formal equality, however, does not suffice to provide each with equal opportunities and real equality, which is why fundamental non-market rights complement fundamental non-market liberties.

Fundamental non-market rights consist of economic, social and cultural rights. They are essential in balancing between liberal and social values. For example, the European Charter of Fundamental Rights recognises several economic rights, such as entitlement to social security and social assistance. These include benefits and social services providing protection in maternity, illness, industrial accidents, dependency, old age and loss of employment. (Article 34(1) CFR.) The Charter also recognises everyone's right to access preventive health care and the right to benefit from medical treatment. (Article 35 CFR.) Article 36 CFR, on the other hand, states how the Union 'recognises and respects access to services of general economic interest as provided for in national laws and practices'. However, Articles 22 and 25 CFR stipulate how the Union respects cultural, religious, and linguistic diversity and the rights of the elderly to participate in social and cultural life.

In both market and non-market social relations, public power must protect natural and legal persons' liberties and rights.[284]

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[284] Some fundamental liberties rights, such as equality before the law (Article 20 CFR), the right to good administration (Article 41 CFR), and the right to an effective remedy, a fair trial and legal aid (Article 47 CFR), are essential in terms of both realising liberties and rights, as well as formal and real equality in social relations. These can be referred to as administrative and judicial rights. These rights are primarily excluded from the research because they are *instrumental rights*, that is, rights incremental for the protection of rights. Everyone enjoying any liberties and rights, has corresponding administrative and judicial rights.

4.3.2 Sources of Legal Duties

4.3.2.1 Preliminary

The European Union's primary legislation protects liberties and establishes rights for natural and legal persons. It also recognises and establishes *legal duties*. While the EU does not explicitly recognise civic duties for individuals or private bodies[285], it has several provisions permittingintervention in the liberties and rights of private law entities. These provisions create both negative and positive duties for private law entities. This research recognises that there exist general duties of individual and private bodies, such as criminal liability, stemming from respect for the individual sphere of autonomy. There are also general duties such as compliance with the law and the legal obligation to pay taxes. The EU, however, adds another layer to the legal duties of private law entities, particularly as reagards the liberties and rights established by the Union. These sources of legal duties are (1) Union objectives, (2) general interests and (3) the liberties and rights of others.

4.3.2.2 (1) Promotion of Union Objectives

Article 3 of the Treaty on European Union recognises the objectives of the European Union. These objectives include the promotion of peace and the values of the EU. (Table 7; Table 8.) In addition to objectives like establishing an area without internal frontiers, which is the source of internal market liberties and rights, the Union recognises equality, solidarity and the rights of the child. In external relations, the EU also recognises human rights, in particular the rights of the child. Here, the focus is on establishing a highly competitive market economy and protecting and improving the quality of the environment. These (i) economic

[285] The Preamble to the Charter of Fundamental Rights does include a general notion on how 'enjoyment of these rights entails responsibilities and duties regarding other persons, to the human community and future generations' (CFR Preamble, [6]). The European Convention on Human Rights refers to civic duties: Article 4 of the Convention states that citizens may have ordinary civic obligations to perform work or other services and that these are not considered as forced labour or slavery, which are forbidden. There are, however, no general duties explicitly recognised in the Charter of Fundamental Rights or the European Convention on Human Rights. The duties established by the constitutive treaties are primarily duties of the Member States. ECHR Article 4 states that citizens may have normal civic obligations to perform work or services which are excluded from definition of forced labour or slavery. Military service in both peacetime and wartime is most likely included in this definition, but also other duties.

Article	Union objectives
3(1) TEU	Peace Promote Union values Well-being of its people
3(2) TEU	Area of freedom, security and justice Area without internal frontiers; free movement Respect the external border controls, asylum, immigration and the prevention and combating of crime
3(3) TEU	Establish the internal markets Sustainable development of Europe: - Balanced economic growth - Price stability - Competitive markets - Social economy (full employment; social progress) Protect and improve the quality of the environment Promote scientific and technological advance Combat social exclusion and disrimination Social justice and social protection Equality Solidary between generations The rights of the child Economic, social and territorial cohesion Solidarity among Member States Rich cultural and linguistic diversity Safeguarding and enhancing Europe's cultural heritage
3(4) TEU	Economic and monetary union whose currency is the euro
3(5) TEU	In relation with the wider world: - uphold and promote its values and interests and contribute to the protection of its citizens - contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, - contribute to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.

Table 7. Objectives of the European Union in the Treaty on European Union.

objectives and (ii) environmental objectives are the primary sources of legal duties for private law entities in the European Union. Key Treaty provisions and principles relating to the objectives not directly addressing private law entities include the (iii) technological and scientific objectives of the Union and the (iv) social objectives of the Union. While both economic and environmental objectives and technological and scientific objectives are inherently likewise social, they are separated from the social objectives of the Union recognised in Article 3(3) TEU. These objectives include combatting social exclusion and discrimination, promoting social justice and

social protection and solidarity between generations, economic, social and territorial cohesion and cultural objectives.

(i) Economic Objectives

The Union's economic objectives are the establishment the internal market, balanced economic growth and competitive market. The provisions relating to the economic objectives of the Union form a substantial part of the Treaties. The Treaty provisions define applicable policies and related competencies. The Treaty on the Functioning of the European Union establishes basic principles and policies relating to the Internal Market (Title I TFEU), free movement of goods (Title II TFEU), free movement (Title IV TFEU), common rules on competition and taxation (Title VII TFEU), and economic policies (Title VIII TFEU). The institutional competencies and Protocols established in the Treaty European Union complement these provisions.

Economic objectives	establishment of internal markets, balanced economic growth, and competitive markets (Article 3(2) and 3(3) TEU)	Prohibition of anti-competitive practices (Article 101 TFEU); proibition of abuse of dominant market position (Article 102 TFEU)
Environmental objectives	the protection and improvement of the quality of the environment (Article 3(3) TFEU)	Promoting sustainable development in EU policies (Article 11 TFEU); stating environmental policy objectives (Articles 191–193 TFEU); Polluter-Pays Principle (Article 191(2) TFEU)
Technological and scientific objectives	Promote scientific and technological advance (Article 3(3) TEU)	Articles 179-190 TFEU
Social objectives	Full employment and social progress; economic, social and territorial cohesion; solidarity; rich cultural and linguistic diversity; safeguarding and enhancing Europe's cultural heritage (Article 3(3) TEU)	European Investment Bank (Protocol (No 5) TEU); European Cohesion Fund (Article 177 TFEU; Protocol (No 28) TEU; European Investment Bank (Protocol (No 5) TEU; Articles 308–309 TFEU), and the European Social Fund (Articles 162–164 TFEU); Protocol (No 26 TEU) on services of general interest; Protocol (No 28 TEU) on economic, social and territorial cohesion; services with general economic interests (Article 14 TFEU); European Social Fund (Article 162 TFEU); Economic, social and territorial cohesion (Article 174-178 TFEU); European Cohesion Fund (Article 177 TFEU); social objectives in Union policies and activities (Article 9 TFEU); aids granted by States with social objectives compatible with internal markets (Article 107 TFEU); Social policy in the Union and the Member States (Articles 151–161 TFEU)

Table 8. Objectives of the European Union in the Treaty on European Union and Treaty on the Functioning of the European Union.

From the perspective of the legal duties of PLEs, the objective of enforcement of competition addresses them directly. Firstly, Article 101(1) TFEU forbids

> all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market.

The Article refers to agreements which directly or indirectly fix purchase or selling prices or any other trading conditions, limit or control production, markets, technical development, or investment, share markets or sources of supply, or apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage. Such agreements are automatically void.[286]

Secondly, another possible source of distortion of competition may be a single market actor abusing their dominant market position. Such abuse may consist of

> (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
>
> (b) limiting production, markets or technical development to the prejudice of consumers;
>
> (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
>
> (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by nature or according to commercial usage, have no connection with the subject of such contracts. (Article 102 TFEU).

Along with the prohibition of State aid (Article 107(1) TFEU)[287], the prohibition of restrictive agreements and abuse of dominant market position stems from the principle of competition.

The European Union also recognises legal duties protecting human rights, including criminal actions taken against illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime. (Article 83(1) TFEU.) Article 310(3) TFEU also established

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[286] Craig & de Búrca 2015, 1069, and cases mentioned therein, including Case 322/81 *NV Nederlandsche Banden Industrie Michelin v Commission of the European Communities* [1983] ECLI:EU:C:1983:313

[287] Article 107(1) TFEU: 'Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.'

that the Union and the Member States, 'in accordance with Article 325, shall counter fraud and any other illegal activities affecting the financial interests of the Union.' Criminal law is enforced in judicial cooperation between the Union and its Member States. (Articles 85-86 TFEU; Article 310(6) TFEU.)

(ii) Environmental Objectives

In addition to the principle of competition, another possible source of legal duties is the protection and improvement of the quality of the environment (Article 3(3) TEU). According to Article 11 TFEU

> Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development.

Articles 191–193 TFEU elaborate the objectives of the Union's environmental policies. According to Article 191(1), the Union policy on the environment contributes to preserving, protecting and improving the quality of the environment; protecting human health; prudent and rational utilisation of natural resources; and promoting measures at the international level to deal with regional or worldwide environmental problems, and in particular, combatting climate change.

Environmental protection has created such widely accepted legal principles as the polluter-pays principle, recognised in Article 191(2) of the Treaty on the Functioning of the European Union.[288]

(iii) Technological Objectives

According to Article 3(3) TEU, the Union promotes scientific and technological advances. Articles 179–190 TFEU elaborate on how the Union pursues the technological and scientific objectives . Article 179(1) TFEU states how the Union shall strengthen its scientific and technological bases by free circulation of scientific knowledge and technology, encouraging competition and encouraging research activity. Article 180 TFEU further describes the measures the Union uses to pursue technological and scientific objectives, including

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[288] See e.g. Ratner 2001, 479–481, and Cooreman 2016. The OECD recommended polluter-pays principles, or PPP, in 1972. It is a 'principle according to which the polluter should bear the cost of measures to reduce pollution according to the extent of either the damage done to society or the exceeding of an acceptable level (standard) of pollution'. Source: OECD Glossary of Statistical Terms: https://stats.oecd.org/glossary/detail.asp?ID=2074 (Accessed on 21 December 2018).

(a) implementation of research, technological development and demonstration programmes, by promoting cooperation with and between undertakings, research centres and universities;

(b) promotion of cooperation in the field of Union research, technological development and demonstration with third countries and international organisations;

(c) dissemination and optimisation of the results of activities in Union research, technological development and demonstration; and

(d) stimulation of the training and mobility of researchers in the Union.

Technological objectives, hence, do not seem to be a source of any legal duties for private law entities but rather a source of opportunities. The same applies to social objectives.

(iv) Social Objectives

The Treaty on European Union recognises objectives such as combatting social exclusion and discrimination, promoting social justice and social protection and solidarity between generations, economic, social and territorial cohesion and cultural objectives. It also recognises objectives such as full employment and social progress. (Article 3(3) TEU.)

Key measures to attain the social objectives include respect for services of general economic interests (Article 14 TFEU; Protocol (No 26) TEU), the pursuit of economic and social cohesion with the establishment of the European Cohesion Fund (Article 177 TFEU; Protocol (No 28) TEU), the establishment of the European Investment Bank (Protocol (No 5) TEU; Articles 308–309 TFEU), and the establishment of the European Social Fund (Articles 162–164 TFEU).

While the European Union prohibits State aid, Article 107(2) TFEU recognises that aid having a social character granted to individual consumers is compatible with the internal market. Article 107(3) TFEU stipulates that aid given to promote the economic development of areas with abnormally low living standards or unemployment or culture and heritage conservation may be considered compatible with the internal market.

4.3.2.3 (2) Protection of General Interests

The social, economic, environmental, technological and scientific objectives of the Union are related to *general interests*. In this chapter, however, general interests refers to interests which constitute *restrictions* on Union objectives and the legal powers derived therefrom . According to Article 45(3) TFEU concerning the free movement of workers, Article 52(1) TFEU concerning the freedom of establishment and Article 65(1) TFEU concerning the free movement of capital, these internal market liberties may be subject to limitations on the grounds of public policy, public security or public health. According to Article 36 TFEU, the prohibition of quantitative restrictions between the Member States allows prohibitions and restrictions on the grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. (Table 9.)

According to Article 346 TFEU, a Member State may take measures necessary for the protection of public security. Public security is an issue where the Member States have national sovereignty and a wide margin of discretion. For example, in the area of civil protection, the Union recognises the authority of the Member States and aims to support and complement Member States' actions and promote cooperation within the Union. (Article 196 TFEU.)[289] According to Article 347 TFEU, Member States may be called upon to take measures to maintain law and order in the event of war or serious international tension constituting a threat of war, or in order to carry out their obligations to maintain peace and international security. However, Member States need to consult each other to take steps to prevent the measures adopted from affecting the functioning of the internal market.

Regarding public health, Union actions complement national policies on improving public health, preventing physical and mental illness and diseases and obviating sources of danger to physical and mental health. (Article 168(1) TFEU.) The Union encourages cooperation between the Member States and third countries. (Article 168(2)–(3) TFEU.)

[289] See also Title XXIII TFEU.

Public policy, public health, public security	Article 45(3) TFEU (free movement of workers); Article 52(1) TFEU (freedom of establishment); Article 65(1) (free movement of capital,)
Public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; the protection of industrial and commercial property	Article 36 TFEU (the prohibition of quantitative restrictions between Member States)
Maintaining law and order in the event of war or serious international tension constituting a threat of war; carrying out obligations of maintaining peace and international security	Article 347 TFEU (public security)
Social policy	Title X TFEU

Table 9. General interests recognised in the Treaty on the Functioning of the European Union.

Treaty provisions no dot define public policies. They seem, nevertheless, to incorporate at least social and financial policies[290]. Social policies include the promotion of employment, improved living and working conditions. (Article 151 TFEU.) According to Article 152 TFEU, the Union recognises the diversity of national systems. Article 156 TFEU establishes that the Commission will encourage cooperation between the Member States in all fields of social policy,, especially in areas of employment and labour law and social security.

4.3.2.4 (3) Protection of the Liberties and Rights of Others

Article 52(1) of the Charter recognises limitations made to meet the need to protect the rights and freedoms of others. For the most part, the rights and freedoms recognised in the Charter regulate vertical relations between private law and public law entities. However, some fundamental non-market rights and the fundamental market right to equal treatment and solidarity market rights do have horizontal applications.

Criminal law also protects fundamental non-market civil and political rights in relations between private law entities. In the EU, issues of criminal law fall under judicial cooperation. Treaty provisions on judicial cooperation in criminal matters

[290] See Articles 63(1) & 65 TFEU. See also Snell 2011.

stipulate that the European Parliament and the Council may adopt directives to establish minimum rules concerning the definition of criminal offences and sanctions. These provisions apply to particularly serious crimes with a cross-border dimension. Crimes included in the scope of the article include terrorism, trafficking in human beings and sexual exploitation of women and children. (Article 83(1) TFEU.) This chapter focuses on legal duties as recognised in the Union primary legislation.

Article 19 of the Treaty on the Functioning of the European Union and Article 21 of the Charter of Fundamental Rights recognises the principle of non-discrimination. The principle of non-discrimination, or the principle of equal treatment, is recognised as directly applicable in horizontal relations.[291] In cases such as *Defrenne*[292], *Angonese*[293] and *Mangold*,[294] the European Court of Justice has established the direct horizontal effect of the principle of non-discrimination. While the principle of non-discrimination initially focused on equality between women and men (Article 3(3) TEU; Article 8 TFEU), the principle currently covers any discrimination on any ground. The principle of non-discrimination is important in horizontal market relations for all natural and legal persons being formally equal in their access to the services, products and work available on the market. It applies to pre-contractual and contractual market relations.

As Chapter 4.3.1 described, solidarity market rights complement fundamental market rights by securing real equality between actors. These rights also have horizontal applications. Article 38 CFR, derived from Articles 12 and 169 TFEU, requires EU policies to ensure a high level of consumer protection. The underlying assumption seems to be that the consumer is always the weaker party in contractual relations.[295] The Treaty provisions on consumer protection do not have direct applicability. Legal duties of private law entities stemming from Article 38 CFR are laid down by secondary legislation controlling the production and properties of services and products, the marketing of products and services, information provided

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[291] Then there is also the issue of war crimes, law of war, and the liability of individuals under international customary law. This issue, however, is not included in the scope of this research, which focuses on the European Union. See e.g. Ratner 2001, 477–478.

[292] C-43/75 *Defrenne* [1976] ECLI:EU:C:1976:56.

[293] C-281/98 *Angonese* [2000] ECLI:EU:C:2000:296.

[294] C-144/04 *Mangold* [2005] ECLI:EU:C:2005:70.

[295] In B2B relations, the protection of the weaker party seems to not have been explicitly recognised and has been assimilated with consumer protection. One might assume that the interests of the weaker party in B2B relations has perhaps been seen to be provided for by competition law. See Hondius 2004.

for consumers, and regulation on access to justice and settlement in cases of consumer disputes.

The rights of employees have been widely recognised in the EU as well as in International Labour Law.[296] Currently, employee protection has a firm basis in the EU Charter of Fundamental Rights.[297] Nevertheless, employee rights are realised in EU law and national laws and practices, especially regarding collective rights and the right to negotiate.[298]

The horizontal application of the fundamental market rights and solidarity market rights is limited to contractual market relations, including pre-contractual relations. Pre-contractual relations are essential in the market economy. They involve the process of making purchasing decisions, including marketing. Pre-contractual relations also include the process of recruiting an employee, from vacancy notices and job interviews to drawing up and signing a contract. Outside the civil rights protecting the private sphere, liberties and rights recognised in the Treaty provision and general principles do not primarily have horizontal implications unless a contractual market relation exists.

4.4 Analysis of the Legal Powers of PLEs

4.4.1 Introduction

The above systematisation of the Treaty provisions, Charter provisions and general principles of the European Union render seven categories of legal liberties and rights:

Internal market liberties & rights. Internal market liberties stem from the objective of building an internal market without frontiers. From the freedom of movement, the Court has derived the principles of equal treatment, non-discrimination, mutual recognition, proportionality and transparency, which are transferrable into internal market rights.

Fundamental market liberties & rights. The European Union recognises fundamental market liberties and rights stemming from the objective of establishing competitive

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[296] See e.g. Ratner 2001, 476–479.

[297] The CFR is consistent with the ECHR. Relevant rights established in the CFR have equivalent rights in the ECHR, see Charterpedia: http://fra.europa.eu/en/charterpedia/article/52-scope-and-interpretation-rights-and-principles (Accessed on 21 January 2017).

[298] See e.g. Directive 2002/14/EC; Directive 2009/38/EC. The prohibition of child labour, forced labour and slavery, is regulated in criminal law.

markets. Fundamental market rights are necessary to ensure the realisation of fundamental market liberties and that every individual and private body has formally equal access to the services, products and employment created in the market.

Solidarity market rights. Solidarity market rights stem from the objective of the EU to build social markets. Solidarity market rights aim to protect weaker parties in contractual market relations and promote real equality instead of formal equality.

Fundamental non-market liberties and rights. Fundamental non-market liberties include civil and political rights. The source of these liberties is respect for individual autonomy and recognition of the democratic community. Fundamental non-market rights, that is, economic, social and cultural rights, complement fundamental non-market liberties and reflect the social values of Europe.

Treaty provisions do not explicitly recognise civic duties for individuals or private bodies. Civic duties, such as obeying the law and paying taxes, stem from national law. The European Union recognises them as general interests. General interests, including protecting public morality, public policy, public security and public health, can create restrictions on the exercise of internal market liberties and rights for private law entities. Legal duties stemming from respect for the sphere of individual autonomy and for the civil and political rights of others are protected by criminal law. These duties also stem primarily from national law.

However, the EU adds another layer to the legal duties stemming from national law. These legal duties connect with the objectives and values of the European Union stated in Article 3 of the Treaty on European Union.

The objective of competition has given birth to the prohibition of restrictive agreements and abuse of dominant market position, which directly address private law entities.

The protection and improvement of the quality of the environment imply legal duties for private law entities based on the polluter-pays principle.

The promotion of technological and scientific development and the promotion of social progress, economic, social and territorial cohesion and of solidarity, do not imply duties for private law entities, excluding market solidarity.

The establishment of a competitive social market economy with fundamental market rights to equal treatment and solidarity market rights recognised in the European Charter of Fundamental Rights influence horizontal relations between contractual parties either directly or indirectly.

The following section utilises the review on the reviewed Hohfeldian typology of legal powers and legal relations to further analyse the nature of legal powers and legal relations of private law entities in the EU law. The typology distinguishes between

privileges and liberties, general rights and particular rights, and civic duties, general duties and particular duties. Legal powers stemming from contractual relations are recognised but not considered in more detail. Contractual relations are, nevertheless, important in terms of legal duties. Contracts create rights and corresponding duties for contractual parties. In the European Union framework, contractual relations are also essential sources of horizontal legal duties stemming from the fundamental market right to equal treatment and solidarity market rights.

4.4.2 Legal Powers of PLEs & Hohfeldian typology

4.4.2.1 Internal Market Liberties & Rights as Particular Liberties & Rights

Chapter 2.2 outlined the framework for the analysis of legal powers and established that *privileges are liberties extending the field of autonomy for a particular group of legal actors*. Privileges may also be referred to as particular liberties to distinguish them from general liberties. Privileged actors are not formally equal toactors with only general liberties. However, all actors have a general negative duty to respect privileges, even when they cannot enjoy them. This chapter proposes that internal market liberties are, in essence, privileges.

Originally the freedom of movement covered the free movement of workers and freedom of establishment. Free movement was for individuals as employees or service providers. Free movement was extended, *de jure*, to all nationals with the introduction of EU citizenship in 1992 in the Treaty of Maastricht on the European Union.[299] According to Article 20(2)(a) TEU, citizenship of the Union grants persons the right to move and reside freely within the territory of the Member States.[300] Although the Union extends the freedom of movement to all citizens of the Union, three consecutive arguments support the proposition that internal market liberties remain privileges: (1) Active persons initially had access to freedom of

[299] Current Treaty provisions provide that every national of a Member State shall be a citizen of the Union. Citizenship does not replace national citizenship. (Article 9 TEU; Article 20(1) TFEU.) Freedom of movement is not accessible to European residents who are not citizens of the European Union. This is not, however, significant from the perspective of defining internal market liberties as privileges. It is common to confer rights and liberties according to citizenship. What is more significant in terms of defining internal market liberties as privileges is the development of access to this freedom among Europeans.

[300] See Directive 2004/38/EC on the right of EU citizens and their family members to move and reside freely within the EU.

movement, and although the right to free movement currently extends to all Europeans; (2) the Treaty law still provides more competences for the Union to promote the free movement of active persons; (3) while national policies limit the competencies of the Union, the relation between the Union objective of establishing competitive internal market and the free movement of persons confirms the proposition that *internal market liberties are privileges*.

Firstly, those active in either the labour market or the business sector were the first to access freedom of movement. Initially, the internal market objective meant freedom of establishment (Article 50 TFEU), freedom to provide services (Article 56 TFEU) and free movement of workers (Article 45 TFEU).[301] The freedom currently covers all European citizens (Article 3(2) TEU; Article 21 TFEU; Article 45 CFR).

Secondly, the Treaties provide more competencies for the Union to adopt measures to promote the free movement of 'active persons'. The term 'inactive person' refers to the working-age population outside the labour market. It covers unemployed people and students and parents with family responsibilities remaining outside the labour market.[302] However, inactive persons are not economically inactive. They remain active consumers of services and products. The EU extends access to products and services across borders for all Europeans for all persons. However, this access to services and products in the markets is distinct from access to markets as providers/producers.[303]

One reason why free movement is limited to active persons stems from the social policies of the Member States. Without a common social protection system, the Member States are reluctant to carry the economic burden of Europeans originating from other States.[304] This fact could form a counterargument for considering internal market liberties as privileges. The European Union may very well consider free movement a general liberty which should be accessible to all persons, whether active or inactive, but that the Member States' resistance inhibits this.

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[301] Despite the establishment of Union citizenship, obstacles to free movement persist especially for 'inactive persons'. (See Directive 2004/38/EC.)

[302] See Directive 2004/38/EC.

[303] Without access to freedom of movement, inactive persons benefit indirectly from the internal market liberties enjoyed by workers or businesses through access to the services and products offered across borders. Free movement across borders makes it possible to freely enjoy short visits, such as holidays, in other EU countries. The assumption is, however, that such stays are of limited duration.

[304] The establishment of a common social protection system runs contrary to national interests. Social policies have belonged and continue to fall within to the competence of the EU Member States. Shared competences in the area of social policy cover issues related to the health and safety of workers, working conditions and equality between men and women in employment relationships.

This notion brings the proposition to its third and final argument: Article 50 TFEU states how the European Parliament and Council shall act to attain freedom of establishment, and that priority is to be given to activities 'where freedom of establishment makes a particularly valuable contribution to the development of production and trade'. Those actors with the most significant positive impact on establishing a competitive internal market have the primary access to internal market liberties. The free movement of inactive persons is less significant to establishing an internal market than the movement of active persons.

Internal market liberties are supported by internal market rights derived from the principles of equal treatment, non-discrimination, mutual recognition, proportionality and transparency. The internal market rights protect businesses in the EU public procurement markets. Private individuals may also enjoy internal market rights. The principle of non-discrimination extends to the recognition of diplomas, certificates and other evidence of formal qualifications. (Article 53 TFEU.) As with the internal market liberties, only persons active in the internal market have access to internal market rights. Article 53 TFEU states how the objective is to 'make it easier for persons to take up and pursue activities as self-employed persons'. *Access to internal market rights requires being active in the cross-border markets of public procurements, labour or cross-border markets in services or products, making them particular rights.*

There are, however, liberties and rights that the European Union recognises for everyone, whether they are active persons in the internal market or not. These liberties and rights are fundamental market liberties and fundamental market rights.

4.4.2.2 Fundamental Market Liberties & Rights as General Liberties & Rights

As Chapter 2.2 described, general liberties are liberties and rights recognised for everyone not explicitly excluded by law. Everyone is economically active in a society based on a market economy, whether they are 'active persons' in the internal market.[305] Therefore, everyone who is economically active enjoys fundamental market liberties and rights. In a market-based economic system such as the EU and its Member States, fundamental legal liberties and rights belong to *everyone with economic power*. Without these liberties and rights, individuals would have no access to the products or services they need for living or employment and business

[305] A society where the economic system is not based on markets, fundamental market liberties and rights would not exist or then they would exist as privileges and particular rights, in cases where few individuals would have the rights to exercise economic transactions at the markets.

opportunities required for gathering economic resources to buy the services and products they require.

Fundamental market liberties and rights are accessible to every legal person existing in the sphere of economic life. This means that they are accorded to every private legal person unless otherwise specified by law.[306] These include rights derived from the free movement of goods, persons, services, and capital (Articles 26, 28–37 TFEU). Fundamental market liberties also include the freedom to choose an occupation and the right to engage in work (Article 15 CFR), the freedom to conduct business (Article 16 CFR), the right to property, including intellectual property (Article 17 CFR), and freedom of contract as a general principle. The fundamental market rights to equal treatment and non-discrimination (Article 2 and 3(3) TEU; Articles 8, 10 and 19 TFEU) are necessary for the full realisation of fundamental market liberties. As described above, the European Court of Justice has established the direct horizontal effect of the principle of non-discrimination.[307]

The principle of non-discrimination is a general right, and implies a corresponding general duty. Treaty provisions prohibit discrimination based on specified qualities, namely sex (Article 3(3) TEU; Article 8 TFEU), racial or ethnic origin, religion or belief, disability, age and sexual orientation. (Article 19 TFEU; Article 21 CFR). However, the objective of the provisions is to demonstrate how these aspects are considered non-relevant for market relations and, hence, should not determine whether or not a market relation is created. These individual qualities belong to the non-commercial life-sphere. Also, the grounds for discrimination themselves are very comprehensive, including nationality. As every European individual and private body has a nationality, they also have the fundamental market right to be treated equally in the European internal market. However, without the objective of establishing an internal market, nationality could very well be a legitimate factor considered in economic relations.

In principle, legal duties stemming from the fundamental market right to equal treatment obligate all contractual parties, whether weaker or stronger. This *all-inclusive applicability of the principle of non-discrimination supports the argument that the fundamental market right to equal treatment is a general right*. However, in practice, it is often the stronger contractual party who may exercise their fundamental market liberties in a manner that prevents the weaker party from exercising theirs, especially

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[306] Limitations of autonomy for minors and others under guardianship are established by law based on their incompetence and limited capability to make rational decisions.

[307] See above Ch. 4.2 & 4.3.1.2.

as regards contractual freedom. Solidarity market rights consider this contractual imbalance, establishing rights for weaker contractual parties.

4.4.2.3 Solidarity Market Rights as Particular Rights

Solidarity market rights are particular rights in all possible terms. Chapter 4.3.1 described solidarity market rights as rights granted to workers and consumers. Workers' rights include the prohibition of slavery and forced labour (Article 5 CFR), protection in the event of unjustified dismissal (Article 30 CFR), fair and just working conditions (Article 31 CFR), freedom of assembly and association (Article 12 CFR), access to information and consultation for workers and their representatives (Article 27 CFR), as well as the right to negotiate collective agreements and take collective actions to defend their interests, including strike action (Article 28 CFR). Consumer rights are recognised in Article 38 CFR and Articles 12 and 169 TFEU, which obligate legislators to issue a regulation to protect the interests of consumers.

Solidarity market rights are sources of *particular legal duties* for employers, producers and sellers of services and products. Employee rights do not only create corresponding negative duties not to violate the rights of the employees, but the Charter creates positive duties for employers to ensure and promote employee participation in corporate governance. According to Article 27 CFR: 'Workers or their representatives must, at the appropriate levels, be guaranteed information and consultation in good time in the cases and under the conditions provided for by Community law and national laws and practices.'

4.4.2.4 Fundamental Non-Market Liberties & Rights as General Liberties & Rights

Internal market liberties and rights, fundamental liberties and rights, solidarity market rights and the legal duties appertaining to them are legal powers the European Union has added on top of the national legislation. These liberties and rights are related to the Union objectives of establishing an internal market and building a social market (Article 3(3) TEU). However, the EU recognises legal powers that are not directly related to the market. These liberties and rights are referred to as fundamental non-market liberties and fundamental non-market rights. However, this does *not* mean that they are *not* relevant for the market and market relations. The significance of fundamental non-market liberties and rights stems not only from

economic but also from political and social life: Private law entities are not just sources of liberties and rights but also sources of *corresponding duties*. (Table 10.)

European legal culture protects individual autonomy and freedom. European political culture, on the other hand, supports democratic decision-making. The social values of Europe promote the well-being of its citizens in all situations of life. The European Union recognises basic human rights, civil rights, political rights and also economic, social and cultural rights. These rights stem from the common constitutional heritage and values of the Member States of the Union and reflect not only economic life but also political and social life. Unlike market-related liberties and rights, fundamental non-market liberties and rights are recognised mainly in the European Charter of Fundamental Rights.[308] The only Treaty provisions concern

Internal market liberties	Free movement of workers (Article 3(2) TEU; Articles 4(2)(a), 20–21, 26 and 45–48 TFEU); freedom of establishment (Articles 49(1) & 55 TFEU); freedom to provide services (Articles 56 & 62 TFEU)	**Privileges (≈ particular liberties)**	Active persons; relation to Union objective of the establishment of internal markets;
Internal market rights	Principles of equal treatment, non-discrimination, mutual recognition, proportionality and transparency	**Particular rights**	
Fundamental market liberties	Freedom to choose an occupation and right to engage in work (Article 15 CFR); freedom to conduct business (Article 16 CFR); right to property, including intellectual property (Article 17 CFR); freedom of contract	**Liberties (≈ general liberties)**	All market actors; relation to the economic system
Fundamental market rights	Principles of equality and non-discrimination (Article 2 TEU; Articles 8, 10, 19 & 21 TFEU)	**General rights**	
Solidarity market rights	Worker's rights (Articles 5, 12, 27-28 & 30-31 CFR); consumer rights (Articles 12 & 169 TFEU; Article 38 CFR)	**Particular rights**	Weaker contractual parties in market relations; relations to the market system and European values
Fundamental non-market liberties	Civil & political rights (Articles 1–12, 39–40 CFR; Article 20 TEU)	**Liberties**	Societal membership; relation to European constitutional culture, values of liberalism and socialism
Fundamental non-market rights	Economic, social and cultural rights (Artilces 22, 25, and 34–36	**General rights**	

Table 10. Particular and general liberties and rights in the European Union.

[308] The adoption of CFR as a list of fundamental rights reflects the struggle of European constitutionalism on the supranational level. The German Constitutional Court raised the issue in a case referred to as *Solange I*. (Case 11-70 [1970] ECLI:EU:C:1970:114) A few years later in *Solange II*, however, the German Constitutional Court considered the issue to have been resolved by the adoption of 'various declarations on rights and democracy by the Community institution'. (*BVerfGE Beschluß vom* 22/10/1986 (2 BVR 197/83 (Solange II), Extract from grounds, Section B, part II, [2(e)]). The Lisbon Treaty rectified the lack of a list of fundamental rights by ruling that the Charter of Fundamental Rights (CFR) is part of the primary law of the European Union.

the electoral procedure of the European Parliament (Article 14 TEU; Articles 20, 22 and 223 TFEU) and citizens' initiative (Article 11(4) TEU; Article 24(1) TFEU).

Fundamental non-market liberties include human rights such as the right to life (Article 2 CFR) and the right to the integrity of the person (Article 3 CFR). They include civil rights such as respect for private and family life (Article 7 CFR) and the protection of personal data (Article 8 CFR). They also include political rights such as freedom of thought, conscience and religion (Article 10 CFR) and freedom of expression and information (Article 11 CFR). Fundamental non-market liberties create a corresponding general duty to respect them. Human and civil rights enjoy special protection by criminal law. Fundamental non-market liberties are general liberties, in all senses and purposes, even though minorities may have limited access to them. Limited access requires specific exclusion based on the assumption of the right of individuals to exercise their liberties responsibly.[309]

Fundamental non-market rights, on the other hand, consist of economic, social and cultural rights. The Charter recognises economic rights, such as entitlement to social security and social assistance (Article 34(1) CFR) and cultural, religious and linguistic rights (Article 22 CFR).[310] The promotion of economic, social and cultural rights requires positive measures, in other words, resources. As governments have limited resources, they may need to limit access to fundamental non-market rights. A government may impose criteria related to the socio-economic or socio-demographic status of the holder of the rights. Nevertheless, fundamental non-market rights are general rights. They belong in principle to every member of society.[311] Economic, social and cultural rights stem from social values and have their basis in *need* in case of objective rights (e.g. social security) or in *status* in case of subjective rights (e.g. parental leave, parental benefits, child benefit or retirement.[312] Access to these rights is not based on societal utility, although supporting individuals may contribute positively to general interests, such as security and stability. Unlike in the case of particular rights, however, these rights have intrinsic value. Their value is not primarily in the utility they create. A key criterion of access is membership of society. This membership is restricted on grounds , for example, ofnationality.

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309 This includes possible criminal sanctions implying that the person has abused their legal liberties.

310 See above Chapter 4.3.1.5

311 Excluding rights strongly connected to biological sex, such as the right to antenatal maternity leave.

312 Various benefits are often also connected to need but not necessarily.

4.4.2.5 Civic Duties in the EU

In order to protect general interests, legal systems have created general duties. Every private law entity enjoys these liberties and has the legal duty to respect the liberties of others. General duties stemming from general interests are unilateral duties and are considered here as civic duties. They create duties without corresponding general liberties or rights. Civic duties recognised by the EU stem from Union objectives and general interests.

The European Union has a variety of objectives. The Treaty provisions describe policies which advance the economic, environmental, technological and social objectives of the Union. However, only economic and environmental objectives appear as sources of civic duties for private law entities.[313] Article 101 TFEU limits the freedom of contract by forbidding agreements with the object or effect of preventing, restricting or distorting competition within the internal market. Article 102 TFEU, on the other hand, limits freedom to conduct business by prohibing the abuse of a dominant market position. The Union may also establish minimum rules creating legal duties for private law entities to tackle fraud and other illegal activities affecting the financial interests of the Union. (Articles 310(3) and 325 TFEU; Article 83(1) TFEU.) Environmental objectives may be sources of civic duties for individuals based on the polluter-pays principle. (Article 191(2) TFEU.)

The liberties and rights of private law entities are also restricted by general interests, including public policy, public security or public health, which are also sources of legal duties for private law entities irrespective of the nature of the liberty and right enjoyed by the individual or private body. In the European Union, general interests are recognised particularly as sources of restrictions of internal market liberties. (Articles 36, 45(3), 52(1), 65(1), 168(1), 196, and 346–347 TFEU.)[314]

4.5 Summary & Conclusion

Based on the systematisation of the EU primary legislation, this chapter recognises the following categories of liberties and rights: (a) internal market liberties, (b) internal market rights, (c) fundamental market liberties, (d) fundamental market

[313] See above Ch. 4.3.2.2.

[314] See above Ch. 4.3.2.3.

rights, (e) solidarity market rights, (f) fundamental non-market liberties and (g) fundamental non-market rights.[315]

Internal market liberties include free movement of workers, freedom of establishment and freedom to provide services.

Internal market rights stem from the principles of equal treatment, non-discrimination, mutual recognition, proportionality and transparency.

Fundamental market liberties include rights derived from the free movement of goods, persons, services and capital, as well as the freedom to choose an occupation and the right to engage in work, the freedom to conduct business, and the right to property, including intellectual property, as well as freedom of contracts as a general principle.

Fundamental market rights are rights derived from the principles of equality and prohibition of discrimination based on gender, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

Solidarity market rights are provided for weaker parties: workers and consumers in contractual and pre-contractual market relations.

Fundamental non-market liberties include human, civil and political rights recognised in the Charter.

Fundamental non-market rights include economic, social and cultural rights recognised in the Charter.

The systematisation also distinguishes three sources of legal duties: The rights and freedoms of others, general interests and Union objectives.[316] Union objectives and general interests are justifications for restricting internal market liberties, fundamental market liberties and fundamental non-market liberties recognised by the EU. Competition law creates the most extensive corpus of legal duties. Securing competition is one of the main objectives of the European Union, and the regulation of concentration of economic power influences the legal powers of private law entities. Other European Union objectives include protecting and improving the quality of the environment, promoting social progress and also economic, social and territorial cohesion and solidarity.[317]

According to Articles 45(3) and 52(1) TFEU, internal market liberties may be restricted on the grounds of public policy, public security or public health.[318] These

[315] See above Ch. 4.3.1.5.

[316] See above Ch. 4.3.2.

[317] See Article 3(3) TEU.

[318] See also e.g. Dir. 2004/38/EU, Chapter IV.

restrictions stem from general interests. According to Article 52(1) CFR, the rights and freedoms provided by the Charter may be limited 'if they are necessary and genuinely meet objectives of general interests recognised by the Union'.[319] General interests form a second important source for negative and positive legal duties for natural and legal persons.

Other significant sources of legal duties are the liberties and rights of others. Article 52(1) of the Charter recognises limitations to meet the need to protect the rights and freedoms of others. The scope of this article is limited to the rights and freedoms as recognised in the Charter.[320] This chapter recognises the limitations on the liberties and rights recognised by the Union stemming from the fundamental market rights and solidarity market rights of the contractual party recognised in the European Charter of Fundamental Rights.

Chapter 4.4 presented a detailed analysis of the nature of these rights and liberties in terms of legal powers. The analysis utilised the Hohfeldian typology of legal powers and relations reveiwed, distinguishing contractual rights and corresponding duties and legally establishing particular rights, general rights, liberties and privileges, and civic duties.

This chapter argued that internal market liberties are privileges (i.e., particular liberties) and that internal market rights are particular rights. They create corresponding particular negative and positive duties for public powers. It also argued that fundamental market liberties are general liberties and fundamental market rights are general rights which create general negative duties. On the other hand, solidarity market rights were considered particular rights, creating corresponding particular duties in contractual and pre-contractual relations between private law entities. Finally, it was argued that fundamental non-market liberties are general liberties and fundamental non-market rights are general rights. (Figure 9.) The next chapter takes the groundwork provided here and applies it to the special case of corporations as legal entities.

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[319] Limitations are not possible in the case of absolute rights. Absolute rights include, for example, the prohibition of torture. Prohibition of torture was mentioned by the Commission as an example in its Communication establishing a strategy for the effective implementation of the Charter of Fundamental Rights by the European Union (COM/2010/0573 final, Preambles, [15]).

[320] See Article 6(1) TEU. The EU has not yet acceded to the European Convention for the Protection of Human Rights and Fundamental Freedoms (see Article 6(3) TEU). While the Court of Justice draws inspiration from it, it has concluded in several cases and opinions how accession has not yet proved compatible with Treaty law. For a full account of the process, see e.g. Opinion 2/13 of the Court [2014] ECLI:EU:C:2014:2454.

Figure 9. The horizontal and vertical legal relations of corporate entities in the European Union.

5 CORPORATIONS AS LEGAL ENTITIES IN THE EU

This chapter systematises the legal powers of corporations in the framework of the primary legislation of the European Union. It recognises the sources of legal powers of corporate entities as legal entities and proposes a model of corporate legal personhood in the EU. Chapter 5.1 introduced the various types of business entities by providing examples from Finnish Law, and Chapter 5.2 studies the recognition of corporations as legal entities and their legal powers in the EU. Chapter 5.3 systematises the legal powers of CEs recognised by the EU. It argues that corporate entities as market actors enjoy fundamental market liberties and rights, and for-profit corporate entities enjoy the privileges of internal market liberties and rights. CEs do not enjoy solidarity market rights nor fundamental non-market liberties and rights. Legal duties of CEs stem primarily from the general interests, economic and environmental objectives of the Union. In horizontal relations, corporate entities have duties stemming from solidarity market rights. Chapter 5.4 then proceeds to formulate a model of corporate legal personhood in the EU. It argues that as legal entities, corporate entities as legal entities have characteristics of artificial, real and aggregate entities and that their existence as legal persons is limited to the commercial life-sphere.

5.1 Introduction

Corporations, companies and enterprises are all *business entities*. Several types of business entities exist, from single entrepreneurs to multinational stock corporations. While sole entrepreneurs and the members of small business organisations have close linkage with their business, there are business entities with thousands of individuals associated with the entity. The term 'company' may refer to smaller and larger business organisations. According to the Cambridge Dictionary, 'a company is an organization that sells goods or services in order to make money'.[321] The term 'corporation' may create a distinction between small and large companies. The Cambridge Dictionary defines corporations as 'a large company or group of

[321] Company: https://dictionary.cambridge.org/dictionary/english/company (Accessed on 2 July 2019).

companies that is controlled together as a single organization'.[322] Nevertheless, this distinction is not universal.

The EU Treaty provisions include some definitions of what companies are. According to Article 49(2) TFEU on the freedom of establishment, 'undertakings' are 'in particular companies or firms'. Article 54 TFEU refers to companies as 'formed in accordance with the law of a Member State'. Member States recognise several different types of undertakings. The Finnish legal system, for example, distinguishes five types of business entities: (1) proprietorship, (2) limited company, (3) partnership, (4) limited partnership and (5) cooperative association or cooperative company.

> Proprietorship is a private entrepreneur that uses a company name. The Finnish Company Name Act (*Toiminimilaki* 128/1979, TNimiL) regulates the use of company names. The difference between a private entrepreneur without a company name and a private entrepreneur with a company name is that the company name can be transferred to another. The company name is transferred at the time of the transfer of the business unless the business name includes the surname of the private entrepreneur or its partner, or unless otherwise agreed (TNimiL, Ch. 1, 13 §).
>
> Limited Company. Limited companies are regulated by Finnish Limited Liability Company Act (*Osakeyhtiölaki,* 624/2006, OYL), which recognises that after registration, a limited company has a separate legal personality from its shareholders, and shareholders are not personally liable for the company's liabilities (OYL, Ch. 1, 2 §). The objective of a limited company is to create profit for shareholders unless otherwise stipulated in the company contract or its statutes (OYL, Ch. 1, 5 §). A limited company may be private or public. In Finland, a public company requires a minimum capital of 80 000 euros (OYL, Ch. 1, 3 §). The difference between a private and a public company is that the securities of a private limited company may not be admitted to trading in the securities market (OYL, Ch. 1, 1 §).
>
> Partnership and limited partnership. The Finnish Partnership Act (*Laki avoimesta yhtiöstä ja kommandiittiyhtiöstä* 389/1988, AKL) that partnerships are formed by two or more entrepreneurs engaging in business together for a common economic objective (AKL, Ch. 1, 1 §). A company agreement forms a partnership. Partnership and limited partnership have legal autonomy and legal capacity after registration (AKL, Ch. 1, 2-3 §). The difference between a partnership and a limited partnership is that in a limited partnership, the liability of one or more partners, but not all, for the obligations of the company is limited to the amount of the assets indicated in the partnership agreement (AKL, Ch. 1, 1 §). The partners with limited liability are referred to as silent partners because they have no right to take part in the business or use veto (AKL, Ch. 7, 3 §).

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[322] Corporation: https://dictionary.cambridge.org/dictionary/english/corporation (Accesses on 2nd July 2019).

> Cooperative association, or cooperative company. According to the Finnish Co-operatives Act (*Osuuskuntalaki* 1488/2001, OKL) a cooperative association is a separate legal entity created through registration, and members are not personally liable for the obligations of the cooperative company (OKL, Ch. 1, 1 §). Unless otherwise stated in the association's statutes, the association's objective is to conduct economic activities in support of the members' finances or livelihoods by using the services provided by the cooperative association (OKL, Ch. 1, 5 §). All members of the cooperative have equal voting rights unless otherwise stated in the law or its statutes (OKL, Ch. 1, 7 §).

Here, 'corporate entity' may refer to small, medium-sized, or large companies as long as they are recognised by law as autonomous legal entities. The term corporate entity (CE) will be used to refer to a company composed ofthe group of persons associated with it, irrespective of its size. As business entities, corporate entities differ from private entrepreneurs because the law provides them with a legal entity distinguishable from the legal entity of the entrepreneur.

Rather than considering the size of the entity, the research recognises the level of autonomy of the business entity from the associated actors. A corporate entity is a separate legal entity with rights, liberties and duties of its own. While private entrepreneurs are the same as their business, CEs are separable from their owners, partners and shareholders. They assume different levels of autonomy. This research focuses on corporate entities with separate legal personality and legal autonomy. Thus, it excludes other service providers, such as self-employed people.

The previous chapter systematised the legal powers of private law entities in the Union and described how the European Union recognises several categories of liberties and rights. These categories were internal market liberties and rights, fundamental market liberties and rights, solidarity market rights and fundamental non-market liberties and rights. Chapter 4 also recognised sources of both positive and negative duties for private law entities. It described how Union objectives and general interests are sources for the restriction of internal market liberties, fundamental market liberties and fundamental non-market liberties recognised by the EU. Other sources of legal duties are the liberties and rights of others.

The following chapter provides a systematisation of the legal powers of corporations as legal entities in the EU. The focus is on corporations recognised as autonomous legal entities. First, Chapter 5.2 considers the recognition of corporate entities as autonomous legal persons in the EU. Then, Chapter 5.3 studies CEs as holders of legal liberties, privileges, rights, and duties. Chapter 5.4 then proceeds to formulate a theory of corporate legal personhood in the EU. The chapter analyses the legal powers of CEs in the framework of the three models of corporate legal

personhood. The objective is to recognise the sources of the legal powers of corporate entities and to formulate a theoretical model of corporate legal personhood applicable in the EU legal system. The theoretical model considers the features of all the competing models simultaneously in order to identify the key features of corporations as legal entities. The chapter studies whether CEs as legal entities can be characterised as artificial, real or aggregate entity, or some of them, or all of them as *per* the hybrid model formulated in Chapter 2.1.3. The theoretical model is preliminary and forms a basis for further discussion and development.

5.2 Recognition of Corporate Entities as Autonomous Legal Entities

According to Article 54(1) TFEU

> Companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Union shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States.

Article 54(2) TFEU, on the other hand, defined how

> "Companies or firms" means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those that are non-profit-making.

While Article 54 TFEU has several essential aspects, the first is how the Treaty law recognises companies and firms formed under the law of a Member State. The recognition of a corporation as a legal entity with legal powers in the European Union is subordinate to the corporation being recognised as a legal entity by national civil or commercial law. National laws recognise different types of CEs with legal autonomy and economic autonomy from all or some of the associated members. In Finland, such CEs are limited partnerships, limited companies, and cooperative associations.

According to the principle of equal treatment, different national corporate entities are recognised across the European Union. According to Article 55 TFEU,

> Member States shall accord nationals of the other Member States the same treatment as their own nationals as regards participation in the capital of companies or firms within the meaning of Article 54, without prejudice to the application of the other provisions of the Treaties.

According to Article 56(1) TFEU, on the other hand,

> Within the framework of the provisions set out below, restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended.

To support the internal market opportunities of multinational European business, the European Union has established two multinational corporate forms, the *Societas Europaea* (SE), or European company, and *Societas Cooperativa Europaea* (SCE), or European cooperative company. *Societas Europaea* is a public limited-liability company. *Societas Cooperativa Europaea* is a cooperative society with the objective of satisfying its members' needs and the development of their economic or social activities.[323] Another objective is to remove barriers to trade in the internal market.[324] Both SEs and SCEs have legal personality.[325] In each case their capital is divided into shares. The SCE may also be a limited-liability cooperative company, where the liability of the member is restricted to the amount of capital subscribed.[326]

Nevertheless, the creation of SE or SCE is conditional on their members residing or subsidiaries being governed by the laws of at least two Member States.[327] The corporation must first be established according to national civil or commercial law to acquire legal powers under EU law.[328] A corporation's existence is not conditional on having gone through a statutory process, such as registration. The corporate entity is established once the contracting parties have signed articles of association. However, national civil and commercial law may require that the corporate entity be registered before it may have legal powers, such as acquiring rights, making contracts, or being a party to a legal proceeding.[329] In these cases, the associated legal entities are jointly liable for the obligations of the corporate entity until the registration procedure is complete.

The next chapter systematises the legal powers of corporate entities in the EU formed under the national law of (at least one) Member State and mutually

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[323] Reg. (EC) No 1435/2003, Preambles, [10].

[324] Council Reg. (EC) No 2157/2001, Preambles, [1].

[325] Reg. (EC) No 1435/2003, Article 1(5); Council Reg. (EC) No 2157/2001, Article 1(3).

[326] Reg. (EC) No 1435/2003, Article 1(2); Council Reg. (EC) No 2157/2001, Article 1(2).

[327] Reg. (EC) No 1435/2003, Article 2; Council Reg. (EC) No 2157/2001, Article 2.

[328] Or, as John Chipman Gray noted in 1902: 'If a body of men acts through an organization which the state does not recognize, the law will not give effect to the act as an act of the organization, though it may be the art of some or all of its members.' (Campbell & Thomas 1997, 31.)

[329] See e.g. Chapter 2, 10 § of Finnish Company Law (*Osakeyhtiölaki*, 624/2006).

recognised as autonomous legal entities with a separate legal personality from the associated members.

5.3 Legal Powers of Corporate Entities

5.3.1 Corporate Entities as Holders of Liberties and Rights

This chapter studies corporate entities as holders of liberties and rights recognised by the Union, analysing whether CEs have legal powers based on (a) internal market liberties and rights, (b) fundamental market liberties and rights, (c) solidarity market rights, and (d) fundamental non-market liberties and rights.

(a) Internal Market Liberties & Rights

According to Article 54(1) TFEU, a corporation established according to national laws of a Member State shall, for the purposes of the Treaty Chapter on the right of establishment, 'be treated in the same way as natural persons who are nationals of Member States'. Therefore, for-profit corporate entities formed under the law of a Member State and having a registered office, central administration or principal place of business within the Union can enjoy freedom of establishment (Article 50 TFEU). This means that corporate entities may establish subsidiary branches in other Member States, as confirmed by *Centros*[330] and *Überseering*[331]. Consequently, they also enjoy the freedom to provide services (Articles 56 TFEU). As Chapter 5.3 argued primarily persons considered 'active' have access to internal market liberties. Similarly, access to internal market liberties and rights is provided for profit-making companies.[332] According to Article 54(2) TFEU, companies or firms referred to in Article 54(1) TFEU excludes non-profit companies or firms.

After establishment, corporations may also provide services and products across borders, benefitting from the free movement of workers, services, products and capital. This also makes them active in the internal market. When providing services and products across borders, the corporate entity enjoys the corresponding internal

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330 C-212/97 *Centros* [1999] ECLI:EU:C:1999:126.

331 C-208/00 *Überseering* [2002] ECLI:EU:C:2002:632; See also Heine 2003.

332 The exception of non-profit making companies was established in the Treaty of Rome in Article 58 EEC.

market rights derived from the principles of equal treatment, non-discrimination, mutual recognition, proportionality and transparency when making use of the internal market liberties, especially with regard to accessing the domestic markets and markets for public procurement.

(b)–(c) Fundamental Market Liberties & Rights, and Solidarity Market Rights

As Chapter 4.3.1 described, the Union recognises several fundamental market liberties: Rights derived from the free movement of goods, persons, services and capital (Articles 26, 28–37 TFEU), as well as the freedom to choose an occupation and the right to engage in work (Article 15 CFR), the freedom to conduct business (Article 16 CFR), freedom of contract, and the right to property, including intellectual property (Article 17 CFR). The Union also recognise the principles of equality and non-discrimination as fundamental market rights (Articles 2 & 3(3) TEU; Articles 8, 10 & 19 TFEU; Article 21 CFR). Chapter 4.4.2.2 established that fundamental market liberties and fundamental market rights are general liberties and general rights. The basic principle is that every person active in the markets has access to these fundamental liberties and rights recognised by the EU, whether ifactive across borders.

The freedom to choose an occupation and the right to work may only appertain to natural legal entities because corporate entities cannot be regarded as being self-employed or employees. On the other hand, other fundamental market liberties may appertain to natural persons and corporate entities established according to law. As autonomous legal entities, corporations may also freely conduct business, conclude contracts, hold property and be party to legal proceedings. Peter Oliver described how the freedom to conduct business has been recognised for corporate entities in cases such as *Nold*[333], *Scarlet Extended*[334] and *Alemo-Herron*[335].[336]

As holders of fundamental market liberties, corporate entities enjoy the corresponding fundamental market rights of equal treatment and non-discrimination. However, corporate entities do not possess such attributes as gender, age, racial or ethnic origin, or other properties listed in Article 21 CFR. The principle of equal treatment applies only to the relevant extent, such as contractual relations with national procurement authorities. These principles protect corporate entities,

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333 Case 4/73 *Nold* [1974] ECLI:EU:C:1974:51.

334 C-70/10 *Scarlet Extended* [2011] ECLI:EU:C:2011:771.

335 C-426/11 *Alemo-Herron* [2013] ECLI:EU:C:2013:521.

336 Oliver 2015, 683–84.

mainly in contractual or pre-contractual relations with public authorities. Generally, however, corporate entities are considered stronger parties in contractual relations, especially with consumers and employees. Corporations may discriminate, but they may not be discriminated against on the grounds of these properties, for they have no properties irrelevant for economic relations.

As established in Chapter 4.4.2.3, solidarity market rights are particular rights accessible only to consumers and employees. As a basic assumption, EU law does not recognise CEs as consumers, not even small and medium-sized enterprises (SMEs), even in the case of self-employed traders or family businesses. According to EU law, 'a consumer is a natural person, acting outside the scope of an economic activity (trade, business, craft, liberal profession)'.[337] CEs, hence, do not have access to solidarity market rights. Neither would they seem to have access to fundamental non-market liberties and rights.

(d) Fundamental Non-Market Liberties & Rights

Chapter 4.3.1.5 described how the European Union recognises a group of fundamental non-market liberties and rights. The European Charter of Fundamental Rights acknowledges these rights. Fundamental non-market liberties include human rights (Articles 1–4 CFR), civil rights (Articles 5–9 CFR) and political rights (Articles 10–12 & 39–40 CFR; Articles 11(4) & 14 TEU; Articles 20, 22, 24(1) & 223 TFEU). Fundamental non-market rights include social, economic and cultural rights. The Charter recognises economic rights, such as entitlement to social security and social assistance and also cultural, religious and linguistic rights. (Articles 34–36 CFR.)

Chapter 4.3.1.5 argued that the fundamental non-market liberties belong to all persons considered part of society, its civic and political life. Although access to social, economic and cultural rights is dependent on public resources, Chapter 4.3.1.5 argued that fundamental non-market rights are enjoyed in principle to all members of society. However, membership may be restricted based, for example, on nationality. According to Peter Oliver's study, another restriction could be legal personhood.

Neither the Treaty nor the Chapter provisions explicitly note the legal persons having access to fundamental non-market liberties and rights.[338] Peter Oliver studied

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[337] Library of the European Parliament (6.5.2013). The notion of 'consumer' in EU law: https://www.europarl.europa.eu/RegData/bibliotheque/briefing/2013/130477/LDM_BRI(2013)130477_REV1_EN.pdf (Accessed on 26 February 2020).

[338] Oliver 2015, 680.

the case of the European Court of Justice to determine the fundamental rights of companies. He studied the right to property, the privilege against self-incrimination, freedom of speech, double jeopardy, the right to make political donations, and the freedom of religion. He drew attention to cases where the European Court of Justice extended the rights recognised in the Charter to companies. According to Oliver, there are no cases in the Court of Justice of political donations or freedom of religion in the case of corporations.[339] Neither does Oliver mention any cases where the Court was required to consider whether CEs enjoy economic, social and cultural rights such as the entitlement to social security and social assistance or cultural, religious and linguistic rights. In other words, CEs as autonomous legal persons do not possess *human dignity* nor the liberties and rights derived therein.

Oliver concludes that CEs 'must enjoy the fundamental rights essential to their functions and purpose, namely the right to property and the right to run a business'.[340] Conversely, as will be considered below, corporate entities do not enjoy fundamental rights not essential to their function or purpose. Hence, corporate entities do not enjoy civil or political rights, nor social, economic and cultural rights. An irrefutable example is that it has not been established that corporate entities as legal persons would have the right to vote or stand as candidates in political elections.

5.3.2 Legal Duties of Corporate Entities

According to Chapter 4.3.2, while the EU primary legislation does not explicitly prescribe civic duties for individuals or private bodies, it recognises legal duties. The primary legislation allows intervention in the liberties and rights recognised and protected by the Union based on (1) Union objectives, (2) general interests and (3) the liberties and rights of others.

(1) Union Objectives

As established in Chapter 4.3.2.2, Union objectives include economic objectives, environmental objectives, technological and scientific objectives, as well as social objectives. Chapter 4.3.2.2 also determined that economic and environmental objectives are the primary sources of legal duties for private law entities. From the economic objectives of the Union, the principle of competition in the internal

[339] Ibid., 688–692.

[340] Ibid., 695.

market is the primary source of legal duties for private law entities. Article 101 TFEU forbids all agreements and concerted practices affecting trade between the Member States to prevent, restrict or distort competition within the internal market. The Article applies to 'undertakings and decisions by associations of undertakings'. According to Article 49(2) TFEU on the freedom of establishment, 'undertakings' are 'in particular companies or firms'. A company or a firm may, hence, violate Article 101 TFEU. A corporate entity may also have 'a dominant market position' under Article 102 TFEU. Hence, the CE may violate the prohibition in Article 102 TFEU if it abuses its internal market position.[341] Another essential economic objective is the protection of the financial interests of the Union. (Article 325 TFEU.) Although criminal law belongs primarily under the Member States' competencies, serious crimes affecting the financial interests of the Union, especially counterfeiting and money laundering, are crimes where the Union has legislative powers under Article 83(1) TFEU. Corporations may also be involved in such illicit activities, in which case the CEs may also have criminal liability.[342]

As Chapter 4.3.2.2 recognised, another possible source of legal duties is the environmental objectives of the Union. (Article 3(3) TEU; Articles 191–193 TFEU.) On the other hand, scientific, technological and social objectives are promoted by Union policies and activities and are not sources of legal duties for private law entities.

(2) General Interests

The previous chapter recognised how for-profit CEs enjoy internal market liberties and rights. As Chapter 4.3.2.3 described, the Treaty on the Functioning of the European Union establishes that internal market liberties may be subject to limitations on grounds of public policy, public security and public health. Correspondingly, the for-profit CEs may find their liberties, such as the right of establishment or of free movement of capital, limited 'on grounds of public policy, public security or public health'. (Article 52(1) TFEU; Article 65(1) TFEU.)

(3) Liberties & Rights of Others

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[341] Craig & de Búrca 2015, 1069, and cases mentioned therein, including Case 322/81 *NV Nederlandsche Banden Industrie Michelin v Commission of the European Communities* [1983] ECLI:EU:C:1983:313.

[342] It may, however, be challenging to impute responsibility and efficient sanctions when CEs are involved. See Snider & Bittle 2011.

The duties created by the rights and freedom of others can,for corporate entities, stem from the internal or external relations of the entity. These duties are horizontal. Duties stemming from internal relations derive from the liberties and rights of the associated individuals: owners, partners and shareholders. The duties deriving from external relations, on the other hand, derive from the rights and freedoms of persons with whom the CE has relations but who are not associates of the corporate entity. These persons may have pre-contractual, contractual or non-contractual relations with the CE.

The duties of corporate entities stem primarily from their contractual relations. The fundamental source of internal legal duties is the agreement setting up the company. The agreement setting up the company, on the other hand, is a manifestation of contractual parties exercising their contractual freedom. This agreement defines the internal relations between the CE and its representatives and the shareholders. Shareholders do not enjoy specific rights recognised in the primary legislation. The protection of the interests of shareholders is an issue of corporate governance, which focuses 'on relationships between a company's management, board, shareholders and other stakeholders, and therefore, on the ways the company is managed and controlled'.[343] If, according to the agreements setting up the company, the company is a for-profit company, its managers have a contractual duty to create added value for the owners, partners and shareholders.

Consumers and employees have solidarity market rights recognised in the Treaty provisions and the European Charter of Fundamental Rights. Solidarity market rights protect weaker parties on contractual and pre-contractual relations. Chapter 4.4.2.3 described solidarity market rights as rights granted to workers and consumers. Workers' rights included the prohibition of slavery and forced labour, protection from unjustified dismissal and the right to fair and just working conditions, as well as freedom of assembly and association, access to information and consultation for workers and their representative and rights to negotiate collective agreements and take collective actions. (Article 5, 12, 27–28 & 30–31 CFR.) Article 38 CFR and Articles 12 and 169 TFEU determine the legislators and obligation to protect the interests of consumers. Corporate entities have particular duties stemming from the solidarity market rights of consumers and employees. These duties are established primarily through legislation, especially with regard to the protection of consumer interests. Employee rights recognised in the Charter, on the other hand, may have a

[343] Company Law and Corporate Governance: https://ec.europa.eu/info/business-economy-euro/doing-business-eu/company-law-and-corporate-governance_en (Accessed on 20 December 2018).

direct effect to the extent to which they are recognised in International Labour Law .

In addition to particular duties stemming from solidarity market rights, CEs have general duties stemming from fundamental market liberties and rights. CEs, among other market actors, are requiredto respect the fundamental market liberties of others, especially the freedom to conduct business (Article 16 CFR), the right to property, including intellectual property (Article 17 CFR), and freedom of contract. Fundamental market rights include the principles of equality and non-discrimination (Articles 2 & 3(3) TEU; Articles 8, 10 & 19 TFEU; Article 21 CFR). The Court has established that the principle of non-discrimination has a direct horizontal effect.[344] Fundamental market liberties and rights are essentially market-related legal powers. Their impact on legal powers and legal relations of CEs is limited to pre-contractual and contractual market relations, whether internal or external.

Fundamental non-market liberties create a general duty to respect the fundamental non-market liberties of natural persons. These liberties and rights include basic human rights to human dignity (Article 1 CFR), life (Article 2 CFR), and integrity of the person (Article 3 CFR), as well as the prohibition of torture and inhuman or degrading treatment or punishment (Article 4 CFR).[345] The violation of these rights comes s under criminal law. As Chapter 4.3.2.4 described, criminal law falls primarily within the jurisdiction of the Member States, but judicial cooperation is exercised in cases of particularly serious crimes, such as terrorism and human trafficking. However, a corporate entity as a legal entity seems to have only limited culpability under criminal law. Schrempf-Stirling and Wettstein reported that no corporation had been found guilty of human rights violations under international human rights law.[346] Consumer law and labour law protect some human and civil rights, such as personal data (Article 8 CFR) in pre-contractual and contractual relations, thereby highlighting contractual market relations as the primary source of horizontal legal duties for CEs.

[344] C-144/04 *Mangold* [2005] ECLI:EU:C:2005:70.

[345] Cf. Rome Statute of the International Criminal Court (17 July 1998), see Articles 1, 5–8 and 25–28.

[346] Schrempf-Stirling & Wettstein 2017, 545.

5.4 Corporate Entities as Legal Persons in the EU

5.4.1 Introduction

The systematisation of the legal powers of corporate entities in the European Union demonstrated that CEs do indeed have *legal capacities* and may acquire *legal powers*. Business entities may be recognised by national civil or commercial law as autonomous entities. In Finnish law, limited and cooperative companies and partnerships have separate legal personality from their partners. In cases of limited and cooperative companies, after registration, shareholders are not personally liable for the liabilities of the company. According to Finnish law, the company as a separate legal entity may acquire rights, make contracts, or be party to a legal proceeding after registration.[347] As described above, according to the EU primary legislation, corporate entities enjoy legal powers in the form of legal rights and freedoms as well as duties.

Chapter 2.1.1 determined that legal entities are entities recognised in law. It distinguished between legal subjects and legal persons. It determined legal subjects to havelegal rights, and that legal persons can acquire both rights and duties. Moreover, legal persons can establish and change legal relationships. Corporate entities recognised as autonomous legal entities are hence legal persons. As Chapter 2.1.2 noted, there are three competing models of corporate legal personhood. These models are the 'artificial entity model', 'aggregate theory' and the 'real entity model'. To summarise, the artificial entity model views corporations as creatures of the State, aggregate theory views corporations as aggregates of their members, while the real entity model views the corporation as a separate entity.[348]

The models aim to endow corporations as legal entities with a different set of legal capacities and legal powers. However, as discussed in Chapter 2.1.2, all models may be manipulated to accommodate opposing views of the legal powers of CEs.[349] The vagueness of the models is why Chapter 2.1.3 focused on the sources of legal powers of CEs in the various models. The objective was not to impose a particular predetermined set of legal powers on corporations based on a single model. The aim is to *describe* rather than to *prescribe* the legal powers of CEs. The objective is to recognise the various sources of their legal powers, contemplate the idea of corporate

[347] See e.g. Chapter 2, 10 § of Finnish Company Law (*Osakeyhtiölaki*, 624/2006).

[348] See Donyets-Kedar 2017, 63.

[349] See Ibid., 76–77.

entities as legal entities, and ultimately to understand the legal governance of corporate entities.

The analytical framework recognised that the CE's level of autonomy from other legal entities is a key variant. When the autonomy of the corporate entity vis-à-vis the State is low, the State determines the legal powers of the CE, as in the artificial entity model. If the CE's level of autonomy vis-à-vis the associated members is low, the legal powers of the CE stem from the legal powers of the associated members, as in the aggregate entity model. If the level of autonomy of CE is high in relation to both, it reflects the real entity model. However, this research deems it possible to provide CEs with attributes from some or all of the models concurrently It considers the possibility that the legal powers of CEs may stem from multiple sources at the same time. The analysis begins with the real entity model and moves on to the artificial and aggregate entity models.

5.4.2 Sources of Legal Powers of CEs

In the real entity model the corporation is an entity distinct from its members[350] and the CE also exists without recognition from the State.[351] The real entity model views CEs as entities separate from both the State and the associated members. Machen established how this model attributes to CEs the same drives, interests and sense of morality as natural persons, which is why they hold all the legal powers as natural persons.[352]

In the European Union, corporate entities as autonomous entities may have legal rights and liberties as well as duties. To this extent, the legal powers of CEs correspond to the real entity model. There are, however, two critical counterarguments against the real entity model. Firstly, as noted in the previous chapter, CEs do not have all the legal powers of natural persons. The Treaty provisions or case law do not imply that CEs enjoy human rights, civil rights, or political rights. Corporations are not members of civil and political society. Secondly, the law may require that CEs fulfil specific criteria before being deemed legal entities and attributed legal liabilities. The law may also require CEs to be registered before they may hold legal liabilities. For example, Finnish law defines how limited and

[350] Machen 1911, 258.

[351] Ibid., 260.

[352] Ibid., 348.

cooperative companies are separate legal entities created by registration (OYL Ch. 1, 1 §; AKL Ch. 1, 1 §).

In the real entity model, the corporate entity as an autonomous entity exists without recognition from the State.[353] On this basis, every natural person has legal personhood. This legal personhood does not require separate recognition in law. The rights of individuals stem from the idea that every human being is free, equal and has human dignity, as stated in Article 1 of the Universal Declaration of Human Rights (UDHR). And as established by Article 2 UDHR, because of being a human

> Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

While children may not enjoy the status of a full legal person and while individuals may be sanctioned for unlawful actions, they do not lose their status as legal persons.[354] This inalienable status as legal persons does not apply to corporate entities as legal persons. Statutory legislation may require a CE to have a separate legal personality from its partners and shareholders, as in Finnish Company Law, which denies that CEs are real entities. Corporate entities have rights only if they are lawfully established, as stated in *Cartesio*.[355] The Court has also established that abuse of rights and freedoms guaranteed by Treaty provisions may lead to the corporation being deprived of those rights.[356] Corporate entities may also lose their legal personhood through dissolution, after which they cease to have legal duties. Dissolution of the corporate entity may result from bankruptcy, failure or merger, as in Finnish Company Law (OYL Ch. 20, 1 §). The fact that registration is required for a corporate entity to acquire rights, make contracts, or be party to legal proceedings implies that CEs are artificial entities.

Even after being registered, the company does not enjoy the same legal powers as natural legal persons. The company may not, for example, vote in general elections or stand for election. The law may also restrict the liabilities of CEs by excluding, for

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353 Ibid., 260.

354 Even individuals who are under guardianship or imprisoned have certain inalienable rights to secure their lives and dignity.

355 See C-210/06 *Cartesio* [2008] ECLI:EU:C:2008:723, [110].

356 See e.g. C-106/89 *Marleasing SA v La Comercial Internacional de Alimentacion SA* [1990] ECLI:EU:C:1990:395; C-110/99 *Emsland-Stärke GmbH v Hauptzollamt Hamburg-Jonas* [2000] ECLI :EU:C:2000:695; C-255/02 *Halifax plc, Leeds Permanent Development Services Ltd ja County Wide Property Investments Ltd v Commissioners of Customs & Excise* [2006] ECLI:EU:C:2006:121; C-282/12 *Itelcar – Automóveis de Aluguer Lda v Fazenda Pública* [2013] ECLI:EU:C:2013:629. See also Craig & de Búrca 2015, 2011.

example, the possibility of criminal liability in cases not explicitly mentioned. According to Finnish law, criminal liability is that of a natural legal person unless otherwise stipulated.[357] The State defines the extent of the legal powers of CEs. As Oliver established, corporate entities enjoy fundamental rights such as the right to property and the right to run a business.[358] In the European Union, for-profit corporations also enjoy the right of establishment and the corresponding internal market rights provided and protected by the Union. The above systematisation demonstrates that the legal powers of CEs as recognised in the EU are related to the function and purpose of corporate entities to conduct commercial activities (in the internal market).

A corporate entity as an autonomous legal entity endowed with legal powers is dependent on recognition by the State. There are similar autonomous legal entities with different legal powers because of their legally recognised purposes. To give an example, according to Finnish law, registered political parties and constituency associations have the right to nominate candidates in parliamentary elections. Registration of political parties must proceed according to the Finnish Act on Political Parties. Excluding their privileged status of nominating candidates, registered political parties enjoy the same legal powers as registered associations. According to Article 6 of the Finnish Associations Act (503/1989), registered associations may acquire rights, enter into legal proceedings and be party to legal proceedings and any other authority. The members of the registered association are not personally liable for the obligations of the association. Registration has to be performed according to the Associations Act.

On the other hand, Article 2 of the Associations Act states that an association may not be an entity whose purpose is to obtain a profit or have some other direct financial interest in a participant or whose purpose or quality of operation is otherwise primarily economic. In that case, it would be a company and would be subject to different regulations.[359] Corporate entities as autonomous entities may act only for economic purposes. Corporate entities enjoy the rights and liberties

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[357] On corporate fines in Finnish Criminal Law, see *Rikoslaki* 39/1889, Ch. 6, 1 §; Ch. 9.

[358] Oliver 2015, 695.

[359] Also, States can be considered as such associations of individuals, but the legal personhood of the State is conditional upon being recognised by international law. Private persons, whether natural or legal, are not considered subjects of international law and hence have no legal powers in international relations. While States are considered subjects of international law, the legal power of the State is conditional upon its being recognised by other states as stated in Article 3 of the Montevideo Convention on the Rights and Duties of States. According to Article 1, to be recognised as a state, the conditions for statehood must be fulfilled. These conditions are a permanent population, a defined territory, a government and the capacity to enter into relations with other states.

necessary to perform commercial activities. As described by Donyets-Kedar, this corresponds to the artificial entity model.[360]

The existence of a corporate entity as an autonomous legal entity with a set of legal powers may depend on statutory legislation. However, a critical factor in establishing a company is the charter establishing that company. This charter is a contractual agreement between the associated members. The existence of a CE is contingent upon the associated members exercising their fundamental market liberty to make contracts. The duties of the CE established are towards the associated members, the partners, or shareholders. While the Finnish Company Law states that the objective of a limited company is to generate profit for shareholders, it also stipulates that the company contract or its statutes may provide it with different objectives (OYL, Ch. 1, 5 §). The idea of the corporation thus includes contractual elements, which points to the aggregate entity model. The aggregate entity model views the corporate entity as a nexus of contracts.[361] The aggregate model is especially relevant to business entities with a low level of autonomy from the associated members. The business entity corresponding to the aggregate model is proprietorship, where the CE is not a legal person distinct from its owner. The legal powers of the business entity are equal to those of the natural person doing business.

The artificiality of business entities with separate legal personhood recognised by legislation, on the other hand, stems from the State. This 'State intervention' creates corporate entities as legal entities with legal powers in the commercial sphere as if they were real entities engaging in business activities. Especially in cases where the corporate entity carries its own liabilities, the CE is more than the sum of its parts.[362] The State adds this surplus of legal personhood by statutory legislation recognising CEs where the associated members have only limited liability.[363] Nevertheless, the CE would not exist without a contractual agreement between the associated members. The CE may have both contractual and legal duties towards the associated members and legal duties of its own. Both aggregate and artificial entity models are insufficient to describe the nature of corporate entities, while the real entity model has limited applicability altogether.

To summarise, the legal powers of corporate entities stem primarily from the associated members and the State. Once recognised as an autonomous legal entity, the CE is a real entity to the extent that it has legal powers on its own. However,

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[360] Donyets-Kedar 2017, 64.

[361] Donyets-Kedar 2017, 65–66.

[362] Machen 1911, 260.

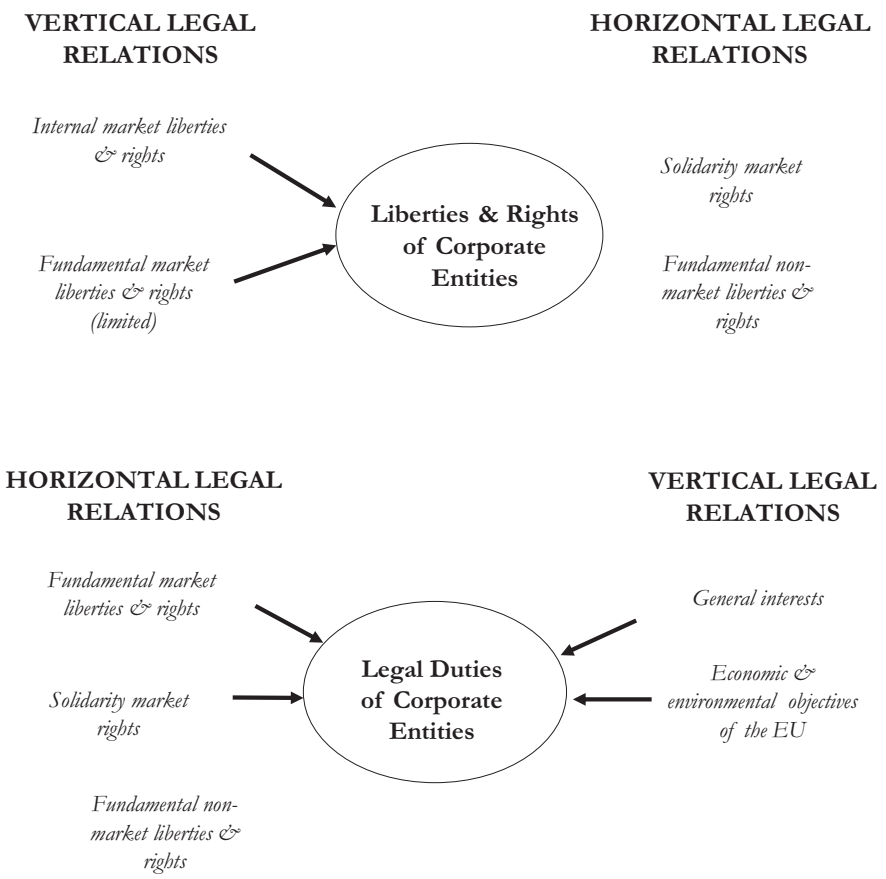
[363] See Phillips 1994, 1108; Donyets-Kedar 2017, 67.

these legal powers are limited to those necessary for the CE to fulfil its business purpose. The State regulates the legal powers of CEs to secure the general interests or protect the liberties and rights of others the same way as the State regulates natural legal persons when they are conducting business. The caselaw of the Court concerning property rights highlights the importance of the nature of activities, whether the actor is a natural or a legal person. As stated in *Nold*, 'the rights thereby granted, far from constituting unfettered prerogatives, must be viewed in the light of the social function of the property and activities thereunder', and '[f]or this reason, rights of this nature are protected by law subject always to restrictions laid down in accordance with the public interest'. While the right to property is protected, the protection cannot be 'extended to protect mere commercial interests or opportunities, the uncertainties of which are part of the very essence of economic activity'.[364]

[364] Case 4/73 *Nold* [1974] ECLI:EU:C:1974:51, Summary, [3]. This can be seen to also extend to private individuals as regards their personal business. However, with proprietorships, the division between personal and business property in more ambiguous than with corporate entities and corporate holdings.

This chapter has introduced the various sources of legal powers of corporate entities as autonomous legal entities in the EU. (Figure 10.) The following chapter aims to discuss the ontology of CEs as legal entities and create a theoretical model of corporate legal personhood in the Union. This model is essential to understand the legal powers of CEs in the Union and continue the discussion about the public management of corporate power in society.

Figure 10. Sources of legal powers of corporate entities in the European Union.



5.4.3 Corporate Legal Personhood in the EU

The above systematisation demonstrates that the legal powers of corporate entities as recognised in the EU are related to the CE's function and purpose of conducting business activities. Corporate entities, as legal entities, are inherently economic. Their recognition as legal persons with legal powers is limited to the economic life sphere, which can also be described as the commercial life sphere in a market economy. Corporate entities have no civil or political rights. To the extent that a corporation might appear to enjoy fundamental non-market liberties and rights, such as the right to privacy or inviolability of the home, the persons holding these powers are the associated natural persons existing both in the commercial and non-economic life sphere.

Corporate entities as autonomous legal entities are as 'real' as the natural persons doing business in the economic life sphere. All business entities, including all CEs, enjoy the fundamental market liberties and rights required to participate in economic life. For-profit CEs have equal access to internal market liberties and rights as 'active persons'.[365] The Union considers them to make a more 'valuable contribution to the development of production and trade' (Article 50 TFEU).

A corporate entity may also seem to enjoy fundamental non-market rights, such as the right to privacy. Nevertheless, the legal persons ultimately enjoying these rights are the associated natural legal persons who are members of the civil and political society. A corporate entity has no right to a private life as it only exists in the economic (commercial) life sphere. To this extent, a CE is an 'aggregate entity'. Its legal powers are influenced indirectly by the legal powers of the associated members.

The line between economic (commercial) and non-economic (non-commercial) life spheres is vague. For example, in *Hoechst AG v Commission* (1987), the Court of Justice ruled that while the right to the inviolability of the home enshrined in Article 8 of the European Convention of Human Rights was a general principle of EU law, it did not extend to 'a company's business premises for it concerned the man's personal freedom'.[366] The Court later ruled that inviolability did indeed extend to

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[365] See above Chs. 4.3.1 & 4.4.2.1.

[366] See Craig & de Búrca 2015, 407. See C-46/87 *Hoechst AG v Commission of the European Communities* [1987] ECLI:EU:C:1987:167; C-227/88 *Hoechst AG v Commission of the European Communities* [1989] ECLI:EU:C:1989:337. In the case in question the Commission had ordered an investigation into its suspected anti-competitive practices. According to the Court the Commission had not breached the right to inviolability of the home.

business premises.[367] The European Court of Human Rights (ECtHR) judgment could explain this shift. In 1992, the ECtHR rules that the protection of the individual against arbitrary interference by the public authorities requires the inclusion of certain professional or business activities or premises.[368] This decision implies that the right to inviolability of the home belongs to the natural person associated with the business. The inviolability of the home stems from the non-commercial life sphere even when extending its influence to business premises. Nevertheless, natural persons engaging in business may encounter situations when their fundamental market or non-market liberties and rights are more restricted because of their relation to commercial activities, whether it concerns the inviolability of the home, as in the case above, or the right to property as recognised in *Nold*.[369]

The State may also nullify the CE without the consent of the associated members if the conditions established by law are fulfilled. As a result, the natural persons carry risks related to their business endeavours which may influence their non-economic life sphere, especially in cases where the autonomy of the CE from the associated natural person is low.

On the other hand, the States recognises corporate entities where the associated members have only limited liability. In these cases, the risks to the members are lower than in business entities without limited liability. This disassociation of the CE from its members is made possible by statutory legislation, which creates a *legal personhood surplus*, an autonomous legal person with the qualities of a real person, but only in the economic (commercial) life sphere. (Figure 11.) Hence, the nature of a corporate entity as an autonomous legal person depends on the statutory recognition of their legal personhood, which ultimately makes it an 'artificial' entity.

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[367] C-94/00 *Roquette Frères SA v Directeur général de la concurrence, de la consommation et de la répression des fraudes, and Commission of the European Communities* [2002] ECLI:EU:C:2002:603, [29]

[368] ECtHR *Niemietz v. Germany* [1992] 72/1991/324/396, [31].

[369] Case 4/73 *Nold* [1974] ECLI:EU:C:1974:51, Summary, [3].

Figure 11. Hybrid model of corporate legal personhood in the European Union.

5.5 Summary & Conclusions

This chapter presented a systematisation of the legal powers of corporate entities as autonomous legal persons in the European Union. It recognised which of the legal powers of private law entities recognised in Chapter 4 may also be acquired by corporate entities. To summarise the results of the systematisation:

Corporate entities as business actors enjoy fundamental market liberties and rights the same way as natural legal persons.

For-profit corporate entities also enjoy the privileges of internal market liberties and rights.

Corporate entities do not enjoy solidarity market rights nor fundamental non-market liberties and rights.

The vertical legal duties of corporate entities stem primarily from general interests and the economic and environmental objectives of the Union.

In horizontal relations, the legal duties of corporate entities stem from the fundamental market right to equal treatment and solidarity market rights of their weaker contractual parties.

Chapter 5.4 analysed the legal powers of CEs in the framework of the various competing models of corporate legal personhood to formulate a theory on corporate legal personhood in the EU. It distinguished the various sources of legal powers of a corporate entity, including the associated natural persons, the State, or the CE itself as an autonomous entity. Chapter 5.4.3 formulated a model of the legal personhood of corporate entities in the framework of the EU legal system. It recognised the limits and extent of the legal capacities of corporations as legal entities and established that corporations are entities whose legal personhood is restricted to the commercial life sphere. The model recognised features from the various competing models on corporate legal personhood. The theoretical model formulated is, hence, a hybrid theory. It combines artificial, aggregate, and real entity models to formulate a synthesis that accurately describes legal reality.

According to this hybrid theory, CEs have the characteristics of *artificial entities* due to the following key observations: (1) corporate entities do not have all the legal powers of natural persons; (2) to be recognised as autonomous legal entities, CEs may need to fulfil specific legally established criteria; (3) CEs may lose their legal autonomy after which they may not enjoy legal powers.

Corporate entities also have the characteristics of an *aggregate entity*: (1) there are contractual elements in establishing the corporate entity and endowing it with legal

powers. These contractual elements include the corporation's purpose; (2) in some legally recognised business entities, the entity is *not* an autonomous legal entity; (3) even if fundamental non-market liberties and rights influence the legal powers of the corporations, these liberties and rights do *not* belong to the CE, but to the associated natural persons.

To the extent that the corporate entity is recognised as an *autonomous (real) entity* or *real entity* by law, the personhood of the CE has features of the real entity model: (1) the CE may carry economic liabilities, as do limited liability companies (LLCs), for example. In these cases, the CE is more than the sum of its parts. However, (2) corporate entities have legal powers only to the extent recognised explicitly by law that stem from their business purpose. In the European Union, the liberties and rights of CEs as autonomous legal entities are limited to the economic (commercial) life sphere.

The research has taken its first crucial step in understanding the legal governance of corporations in the European Union. It has recognised the legal powers of corporate entities as autonomous legal persons. It has distinguished the various sources of legal powers of corporate entities and considered the extent and limits of corporate legal personhood, particularly in terms of corporate entities as autonomous legal persons.

This research aims to enhance the understanding of the legal governance of corporate entities in the European Union. Chapter 5 has provided answers to the first two research questions:

> (1) What are the legal powers of corporate entities as autonomous legal persons in the European Union legal system?

And,

> (2) Where do the legal powers of corporate entities as autonomous legal persons origintaw from in the EU?

From the perspective of the research objective, the observation that corporations as legal entities are economic entities is particularly significant. In the EU, their liberties and rights as autonomous legal entities are limited to the economic and commercial life spheres. Corporations do not enjoy civil rights outside those rights required to accomplishtheir purpose that is, doing business. Also, the horizontal duties of corporations stem primarily from their contractual relations with weaker market actors, that is, consumers and employees. These observations serve as the

basis for studying the third question: *Are there any general principles that govern the legal powers and legal relations of corporations in the EU?*

The following chapter aims to identify the general principles governing the legal powers and legal relations of corporate entities in the European Union. It recognises the static and dynamic principles inherent in the EU legal system. It argues how the dynamic principles stemming from the economic model of the European competitive social market economy (ECSME) are significant in understanding the legal governance of corporations because of the nature of corporations as business entities.

6 GOVERNING CORPORATE ENTITIES IN THE EUROPEAN UNION

This chapter aims to ascertain the influence of static and dynamic principles on the legal governance of private law entities (PLEs) and formulate general principles for the legal governance of corporate entities (CEs) in the European Union. It combines the systematisation of the legal powers of PLEs and CEs with the static and dynamic principles of the EU legal system. Chapter 6.2 introduced the static and dynamic principles of the EU primary legislation, focusing on the dynamic principles embedded in the European competitive social market economy (ECSME). Chapter 6.3 studies the general case of legal governance of PLEs. Based on the systematisation of legal powers of PLEs and the static and dynamic principles of the EU, it formulates three general principles: (I) the principle of legal governance of fundamental market liberties and rights, (II) the principle of legal governance of particular liberties and rights and (III) the legal governance of fundamental non-market liberties and rights. Chapter 6.4 studies the special case of corporate entities (CEs). It formulates four principles: (I) the principle of establishing legal autonomy for CEs, (II) the principle of recognition of general liberties and rights for CEs, (III) the principle of providing particular liberties and rights for CEs and (IV) the principle recognising the connection between CEs as autonomous entities and the associated natural persons.

6.1 Introduction

In his speech at Manchester Business School in 2011, the EU Commissioner responsible for Employment, Social Affairs and Inclusion, László Andor, noted how the Union-level principles owed their origin to the post-World War II period when the shape of a new Germany was under discussion'.[370]

> The idea was to find a halfway house (hybrid, cocktail etc.) between a laissez-faire market-based economy and one that was centrally planned and State-directed. The Freiburg School's "social market economy" was the compromise term selected. [371]

According to Nils Goldschmidt and Michael Wohlgemuth, the German *Soziale Marktwirtschaft,* or Social Market Economy, was initiated on Sunday 19th June 1948.

[370] SPEECH/11/695, 1(2).

[371] Ibid.

On this day, Ludwig Erhard, an economist and then director of the Administration for Economic Affairs, announced on radio that rationing and price regulation would end.[372] In the words of Goldschmidt and Wohlgemuth, 'it is fair to say that the origins of the Social Market Economy are diverse and diffuse'[373]. The fundamental ideas of the German *Soziale Marktwirtschaft* are, nevertheless, apparent in the European Competitive Social Market Economy, as Chapter 6.2 further elaborates. They influence the legal governance of both public and private economic power in Europe. As corporations are economic entities, the European Competitive Market Economic principles will probably play a decisive role in determining the legal powers of corporate entities.

This chapter takes the legal powers of PLEs and CEs systematised above in Chapters 4 and 5 and places them in the framework of static and dynamic principles embedded in the EU primary legislation. The objective is to derive general principles that govern the legal powers of private law entities generally and corporate entities specifically.

Chapter 6.2 introduces the static and dynamic principles of the EU legal system. It recognises the dynamic nature of EU economic law and the important role of pragmatic arguments in the legal governance practised by the Union. As Chapter 3.1 described, static principles reflect social values that are ends in themselves. Static principles are the source of principled arguments both for and against public intervention in the liberties and rights of private law entities. Static principles describe moral values. Dynamic principles, on the other hand, consider the outcomes. They represent ideas and beliefs about efficient means to the ends described by static principles. Dynamic principles are sources of pragmatic arguments both for and against public intervention. Chapter 6.2 recognises the static and dynamic principles embedded in the EU legal system.

Chapter 6.3 scrutinises the general case of private law entities and aims to formulate general principles of legal governance of PLEs in the EU legal system. The objective is to formulate a general principle for each of the categories of legal powers identified: fundamental market liberties and rights, particular liberties and rights, and fundamental non-market liberties and rights. The outcome is, hence, three general principles.

Chapter 6.4 goes on to study the special case of corporate entities. The objective is to formulate general principles of legal governance of CEs in the European Union, which aim to capture the reality of the legal governance of CEs in the European

[372] Goldschmidt & Wohlgemuth 2008, 261.

[373] Ibid., 264.

Union. The model of corporate legal personhood serves as a framework for the interpretation of EU law and the formulation of general principles of legal governance of CEs.

6.2 Static & Dynamic Principles in the EU Primary legislation

6.2.1 Static Principles Recognised by the EU

Static principles recognised by the Union stem from the common constitutional traditions and international obligations of the Member States.[374] Article 2 TEU states how

> The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

As described in Article 2 TEU, the Union is founded on a respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights. These fundamental values can be translated into static principles, such as 'everyone is equal', or 'human rights are to be respected'. These static principles reflect societal values, ethics and morals. They are sources of principled arguments for and against public intervention. In particular, they establish a sphere of individual autonomy and freedom where, as described by *Jürgen Habermas,* 'private individuals may legitimately exercise free choice'.[375] The scope of the private sphere, which is the 'morally neutralized domain of private actions'.

Static principles, such as those mentioned in Article 2 TEU, have their origins inEuropean culture, constitutional heritage and common values. As described in the Preambles of the Charter of Fundamental Rights,

> The peoples of Europe, in creating an ever closer union among them, are resolved to share a peaceful future based on common values.

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[374] Article 2 TEU; C-402/05 P & C-415/02 *P Kadi* [2008] ECLI:EU:C:2008:461.

[375] Habermas 1984, 259.

> Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law.[376]

The Charter reaffirms 'the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States'.[377] The Council of Europe's European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), interpreted by the European Court of Human Rights (ECtHR), is essential in the European framework. These static principles are of major significance for the governance of legal powers of natural and legal persons, especially in the non-economic life sphere.

On the other hand, static principles justify public intervention based on general morals, general interests, or to protect those in a vulnerable position. They justify and limit the use of public power influencing legal powers and legal relations.[378] Static principles may be overlapping or contradictory, in which case they need to be balanced with or against each other. For example, individuals liberties and rights could be subjugated to protect national security or justice.

6.2.2 Dynamic Principles Established by the EU

The European Union recognises but does not establish static principles. Instead, the Treaty provisions add layers of dynamic principles that influence the public management and legal governance of both private and public law entities. In particular, the first layer of principles establishing the competitive internal market influences the legal powers of private law entities.[379] Dynamic principles guide the selection of the most efficient legislative and other policy measures. They establish the realm of possibilities in terms of efficacy.[380]

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[376] CFR, Preambles, [1]–[2].

[377] CFR, Preambles, [5].

[378] Part (c) of Chapter 6.2.2 further elaborates how the production of services with general economic interests and services with general interests do not need to strictly comply with the dynamic principle of market competition.

[379] First and second layer, see above Ch. 4.2.

[380] As guiding principles, dynamic principles are used the same way as principles of nature. While principles of nature represent ideas and beliefs about the behaviour of substance, dynamic principles represent ideas and beliefs about the behaviour of individuals and groups of individuals, including ideas and beliefs about the functioning of society and market. Both principles of nature and principles representing ideas about human decision-making and behaviour are working hypothesis. Their validity

The principles of the European Union originated from the principles of the German Social Market Economy. *Soziale Marktwirtschaft,* a doctrine of Social Market Economy going back to post-World War II Germany, supported economic policies promoting both market-based competition and distributive policies.[381] The fundamental principles of the doctrine were (1) pursuing balanced economic growth and protection of price stability, (2) protection of economic activities and competition and (3) steering the economy in a socially acceptable direction by laying down common rules.[382]

The European Competitive Social Market Economy builds on these three principles, which also appear in the Treaties establishing the European Union and its predecessors. The Treaty of Rome (1957) established the principles of fundamental market freedoms and competition law, while the Treaty of Maastricht (1992) established the common macroeconomic policies and established the European Central Bank System to run to monetary policy. The principles of the European competitive social market economy (ECSME) are strongly present in the Treaty provisions. This chapter connects these dynamic principles to the key Treaty provision and general principles of the EU. It begins with (a) balanced economic growth and protection of price stability, then proceeds by studying the (b) market competition, and finally (c) steering the economy in a socially acceptable direction by laying down common rules and avoiding direct intervention.

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is always uncertain, especially what comes to ideas and beliefs about the behaviour of individuals and principles of functioning of society and market. Competing ideas and interpretations are wide-ranging. The dynamic principles of the ECSME reflect the hegemony of market, which itself also include variety of schools.

381 Neoliberalism as it emerged in Europe in the 1950s, supported not only competition but distributive policies. A.J Nicholls (1994) provides a detailed account of the development of the European social market economy in Germany from 1918 to 1963. Nicholls described how the inflation of 1918-23 in Germany and the Great Depression supported the rise to power of Adolf Hitler and the National Socialist German Worker's Party (*Nationalsozialistische Deutsche Arbeiterpartei*, NSDAP) . This was one of the fundamental reasons why monetary policy needed to be separate from economic policies. Several European countries shared the experience of misuse of political power, especially the dictatorships of Benito Mussolini in Italy and Francisco Franco in Spain, as well as economic hardship, loose fiscal policy and inflation during the volatile period of early- and mid-1900s. (Nicholls 1994, 5.) These shared experiences resulted in a decrease in confidence in the ability of democratic politics to govern the economy. The political level could decide on some economic policies, but monetary policy is for experts. (Ibid., 98–101, 115–116, 143–146, & 251.) Even economic policies should not, however, directly intervene in the economy, but rather lay down common rules of operation. (Ibid., 93 & 11.) The economic policy of indirect intervention also goes by the name 'liberal interventionism'. (Ibid., 94.)

382 See Nicholls 1994, 93–94, 98–101, 111, 115–116, 143–146, & 251.

(a) Balanced Economic Growth & Price Stability

Article 3(3) TEU states how the development of Europe is based on balanced economic growth and price stability. Balanced economic growth is ensured through budgetary discipline among the Member States. The budgets of the Member States need to have a ratio of the planned or actual government deficit to gross domestic product (GDP) below 3% and the ratio of government debt to GDP below 60%. The Commission monitors compliance with the budgetary discipline. (Article 126(2) TFEU.) If a Member State fails to fulfil either reference value, the Commission prepares a report to propose measures for that Member State to adopt. (Article 126(3) TFEU.)[383]

Title VIII of the Treaty on the Functioning of the European Union (TFEU) further describes the economic and monetary policies of the European Union and the institutional competencies of the Commission, Council, Parliament and the European System of Central Banks (ESCB) as well as the European Central Bank (ECB).[384]

According to Article 127(1) and Article 282(2) TFEU, the objective of the ESCB is to maintain price stability. While the other objective of the ESCB is to support the general economic policies of the Union and achieve the economic and social objectives laid down in Article 3 TEU, these tasks are performed without prejudice to the objective of price stability.[385] When performing their tasks, 'neither the European Central Bank, nor a national central bank, nor any member of their decision-making bodies shall seek or take instructions from Union institutions, bodies, offices or agencies, from any government of a Member State or from any other body'. Member States governments or other parties are required not to seek to influence the ECB, national central banks, or members of their decision-making bodies'. (Article 7 TEU; Article 130 TFEU.) This mirrors the principle of protection of stable economic growth and price stability by separating monetary policy from

[383] On budgetary discipline during financial and economic crisis, and sovereign debt crisis, see e.g. COM/2015/0801 final on Denmark's compliance with the deficit criterion of the Treaty.

[384] See also Chapter 2 of the Treaty on European Union.

[385] According to Article 127(2) TFEU, the basic tasks of the ESCB are to conduct foreign exchange operations, to hold and manage the official foreign reserves of the Member States, and to promote the smooth operation of payment systems. At the heart of the European System of Central Banks is the European Central Bank (ECB). The ECB has the sole right to authorizing euro banknotes within the Union. (Article 128(1) TFEU.) The ECB also takes part in the supervision of fiscal policies of the Member States with the objective of protecting price stability, financial sustainability, and exchange rates. (Article 140 TFEU.)

democratic decision-making, as per the experiences of hyperinflation preceding WW II.[386] When performing its tasks, the main objective of the ECB is price stability.

The objective of price stability needs to be enforced in a manner that respects the principles of the competitive internal market and efficient allocation of resources (Article 2 of Protocol (No 4) TFEU), which is why the ESCB primarily operates on the open market and through credit operations (Article 18 Protocol (No 4) TFEU). This connects the first principle of the ECSME to the second one.

(b) Competitive Market Economy

Article 3(3) TEU states how the Union established the internal market and how the economic development of Europe shall be based on a highly competitive social market economy. Other Treaty provisions establish how the Union shall work towards an internal market without frontiers. The establishment of the internal market has provided natural and legal persons with several liberties and rights to increase competition through increasing competitors.[387] The principle of competition is also perhaps the most important source of legal duties for both private and public actors.[388] Distortion of competition may result from an agreement between multiple actors or a single market actor abusing their dominant market position (Articles 101 & 102 TFEU). The prohibition of State aid relates to the principles of competition. (Article 107 TFEU.)

The principle of competition, however, is flexible. Article 101 on the prohibition of anti-competitive agreements states that the 'provisions of paragraph 1 may, however, be declared inapplicable' if the agreement of decision contributes 'to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit' (Article 101(3) TFEU). Article 102 TFEU on the abuse of a dominant market position includes no such clause. However, Article 102 TFEU also implies the evaluation of impacts by stating how abuse is determined by the impact on purchase or selling prices, or production, markets and technical development to the prejudice of consumers. Articles 101 and 102 TFEU imply knowledge of the impact on the markets, efficient allocation of recourses, benefits created for consumers, and competition enforcement. Competition authorities evaluate the impact of the

386 See Nicholls 1994, 5.

387 See Goldschmidt & Wohlgemuth 2008, 266, 268 & 270.

388 See above Ch. 4.3.

decision-making and behaviour of market actors on competition, efficiency and consumer benefit.

While the European Parliament, jointly with the Council, exercises legislative and budgetary functions and political control (Articles 14–15 TEU), the Commission may propose regulation, directives and decisions.[389] According to Article 17(2) TEU, 'Union legislative acts may only be adopted on the basis of a Commission proposal, except where the Treaties provide otherwise'. The Commission also has delegated powers under the conditions established by Article 290 TFEU. Delegated power has been granted in areas of regulation requiring a quick response, for example, due to changing market circumstances.[390] With the Court of Justice of the European Union, the Commission oversees the application of Union law, including the supervision of free movement in the internal market and competition. In addition, the Commission's Directorate-General for Competition investigates possible breaches of Article 101 TFEU on restrictive business practices and Article 102 TFEU on the abuse of dominant position.

The members of the Commission are 'chosen on the ground of their general competence and European commitment from persons whose independence is beyond doubt' (Article 17(3) TEU) among the nationals of the Member States (Article 17(5) TEU). For example, the Barroso Commission, which served between 2010–2014, consisted of members with a history in the banking sector, universities (management responsibilities or concerning subjects as economics, technology), boards of various unions or companies, acting as directors, lawyers, consultants, policy advisors, diplomats, *et cetera*.[391] In addition to the Economic and Social Committee and the Committee of Regions, the Commission regularly consults with interest groups and experts.[392]

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[389] See Art. 289(1) TFEU.

[390] Craig & de Búrca 2015, 137.

[391] Source: Who is who – Barroso Commission – European Commission: https://ec.europa.eu/archives/commission_2010-2014/members/index_en.htm (Accessed on 20 November 2019).

[392] While the Commission engages in discussion with interest groups and experts, as well as the various institutions of the EU, Member States, and other regional and international actors, when the Commission adopts a proposal or a decision, they are stripped of any reference to any possible conflicts that are clear in the working documents. As a political force, the Commission aims to appear cohesive, which is probably important for its ability to initiate and see through legislation. What has survived to the final proposal is what the Commission has adopted and for which it thus is responsibleand generally willing to stand behind. See Hyvärinen 2009. While such informal and formal influence on politics and law making is excluded from this examination, it is likely that they do have influence on the policies adopted s. Lobbying is an integral part of EU decision-making. When

As described by Craig and de Búrca, the 'Commission emphasises its work as an autonomous actor, not being controlled by the Council, and limited by interests of the Member States'.[393] Craig and de Búrca have nevertheless conceded that the Council is '*de facto* the catalyst of many legislative initiatives'.[394] However, the Commission ultimately evaluates the proper measures, especially concerning the internal market and competition. This reflects an embedded idea that markets should be governed by knowledge-based management instead of management through politics and party interests.

(c) Social Acceptability & Indirect Intervention

The Treaty on European Union creates a close connection between its economic and social objectives. The ideas of ECSME are strongly present. According to Article 3(3) TEU, the Union is based on 'a highly competitive social market economy, aiming at full employment and social progress'. The Union also combats social exclusion and discrimination as well as promotes 'social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child'. These reflect the static principle of protecting European values.

Nevertheless, objectives such as full employment, decent salary and access to affordable and high-quality services are achieved primarily by establishing functioning markets, enhanced by solidarity market rights.[395] Issues of poverty and well-being are to be solved by competitive markets rather than regulating the prices of services and products. This principle is reflected in *Zaera* (1987), where the Court stated that even though Article 2 of the EEC Treaty committed the Community to raise the standards of living, this objective was to be achieved 'through the establishment of the common market and the progressive approximation of the economic policies of Member States'.[396] This conclusion highlights the principle of

formulating a proposal, the Commission also consults interest groups and experts. Interest groups lobby for the interests of thosethey represent. The number and resources of profit-making groups is much larger than those of non-profit groups are. (Craig & de Búrca 2015, 149.)

[393] Craig & de Búrca 2015, 36.

[394] Ibid.

[395] See Art. 151 TFEU: 'They believe that such a development will ensue not only from the functioning of the internal market, which will favour the harmonisation of social systems, but also from the procedures provided for in the Treaties and from the approximation of provisions laid down by law, regulation or administrative action.' See above Chs. 4.2.1 & 4.3.2.3.

[396] C-126/86 *Fernando Roberto Giménez Zaera v Institut Nacional de la Seguridad Social and Tesorería General de la Seguridad Social* [1987] ECLI:EU:C:1987:395, Summary, [1].

avoiding direct intervention. The horizontal application of the principle of non-discrimination (Article 21 CFR; Article 19 TFEU) aims to ensure that everyone has the same opportunity to enjoy the benefits created by the market, whether jobs, products, or services.

To the extent that the enjoyment of these benefits is dependent on individuals' economic resources, it is considered that competition raises the quality while lowering the prices of goods and services, making higher-quality products more accessible even to individuals with lower income.[397] To the extent that the imbalance of information and power endangers the enjoyment of these benefits in market relations, both pre-contractual and contractual, solidarity market rights aim to protect weaker parties.

Even with competition, the prohibition of discrimination and with employee and consumer rights, there are nevertheless individuals without sufficient resources to access the services and products they require, such as housing. While Article 107 TFEU prohibits State aid, the Article outlines several forms of aid compatible with the internal market. These forms of aid include aid having a social character, such as aid granted to individual consumers.[398] The European Charter of Fundamental Rights recognises several economic rights, such as the entitlement to social security and social assistance (Articles 34–35 CFR). States may also provide services of general economic interest (Article 36 CFR; Articles 14 and 107(2)(a) TFEU). Treaty law does not provide an exhaustive list of services with general economic interests (SGEI). However, transport networks, water distribution network, electricity networks and postal services are considered as such. On the other hand, services with general interests (SGI) include services such as security, justice, compulsory education, healthcare and social services.[399] States may choose how to produce SGEI and SGI. When purchasing SGI from the markets, public authorities need to comply with the general principles of the Union. Instead of price control, access to necessary products and services is primarily ensured through social aid and public services. Social aid and social services create a balance between the 'market' and the 'social' while avoiding direct intervention.

In addition to the social aid and public services the States provide for individuals, aid may also be provided for projects and organisations supporting the social objectives of the Union and its Member States. The European Union has five

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[397] SEC/2007/1521 final, 1.1, [6]–[7].

[398] Provided that such aid is granted without discrimination related to the origin of the products concerned (Art. 107(2a) TFEU).

[399] Protocol No 26 TFEU.

European Structural and Investment Funds (ESIF, or ESI Funds) to support social objectives and social development. The most important fund is the European Social Fund (ESF), established by the Treaty of Rome in 1957.[400] According to Article 162 TFEU, the aim of the ESF is

> to render the employment of workers easier and to increase their geographical and occupational mobility within the Union and to facilitate their adaptation to industrial changes and changes in production systems, in particular through vocational training and retraining.

The ESIFs also include the European regional development fund (ERDF), a Cohesion Fund (CF) for transport and environment projects in the Member States in the weakest economic position, the European Agricultural Fund for Rural Development (EAFRD), and the European Maritime and Fisheries Fund (EMFF). With the resources from these funds, the European Union steers social development while avoiding direct intervention in the economy by binding regulation. The process of applying for the funds creates competition, and the possibility of funding provides market-like incentives for actors to contribute to social objectives, reflecting the second principle of the ECSME. Social objectives are, in other words, pursued through providing contractual privileges rather than civic duties.

The avoidance of direct intervention is also reflected in the use of alternative means of governance, such as self-regulation.

> Self-regulation is a product of industry organisations, generally referred to as self-regulatory organisations (SROs). Private actors have organised into several different organisations covering different industry areas or geographical areas. In Europe, there exists, for example, the European Advertising Standards Alliance (EASA). Industry-based organisations seem to be the most common, which is understandable considering global competition where higher standards for one geographical area would undermine the global competitiveness of businesses residing in that area. Industry-based organisations include, for example, the International Accounting Standards Board (IASB). International Organization for Standardization (ISO) is one of the most influential SROs, publishing standards covering almost every industrial sector, including electronics, telecommunications, packaging, agriculture, and military engineering.
>
> While the ISO has operated since the 1950s, and self-regulation has also been widely recognised as a means of regulation by the EU, the use of self-regulation to complement standard regulation was not officially recognised until 2001. In 2001, the European Commission published a White Paper on European governance. Here, the Commission considered more effective and less intervening means of governing the behaviour of business. It mentioned the use of self-regulation and other non-binding

[400] See Title XI of TFEU.

> tools such as recommendations and guidelines as possible options for standard regulation.[401] The possibility of utilising self-regulation was soon realised on a more practical level, firstly in the 2002 Commission Action Plan for Better Regulation. Secondly, in 2003 at the interinstitutional agreement between the European Parliament, the Council and the Commission on better law-making.[402] In the interinstitutional agreement, self-regulation was defined as giving the economic operators, the social partners, non-governmental organisations or associations the possibility of opportunity to adopt amongst themselves and for themselves common guidelines, particularly codes of practice or sectoral agreements, at the European level.

Self-regulation is used to avoid inefficiencies and costs created by standards regulation.[403] The Commission strategy for 'Better Regulation for Growth and Jobs in the European Union' adopted in 2005 also focuses on analysing the economic costs and benefits of regulation.[404] It encourages considering alternatives to standards regulation.[405] The principles for the use of self-regulation were outlined as follows:

> The Commission will ensure that any use of co-regulation or self-regulation is always consistent with Community law and that it meets the criteria of transparency (in particular the publicising of agreements) and representativeness of the parties involved. It must also represent added value for the general interest. These mechanisms will not be applicable where fundamental rights or important political options are at stake or in situations where the rules must be applied in a uniform fashion in all Member States. They must ensure swift and flexible regulation which does not affect the principles of competition or the unity of the internal market.[406]

Corporate social responsibility has primarily been based on adopting voluntary measures. In 2001, the European Commission defined corporate social responsibility as a 'concept whereby companies integrate social and environmental concerns in their business operations and their interactions with their stakeholders

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401 COM/2001/0428 final, [16.6].

402 COM/2002/0278 final; 2003/C 321/01.

403 2003/C 321/01, [22]. Why self-regulation might succeed, and be more cost-efficient than standard regulation, is that it promotes the long-term economic objectives of business and does not create as much inefficiencies as traditional regulation. (See, e.g., Timonen 2000, 8–9. Karppi & Rantalahti 2009, 49.)

404 On cost-benefit analysis and impact assessment in general, see Driesen 2010; Baldwin 2010; Radaelli & de Francesco 2010.

405 See, e.g., COM/2005/0097 final.

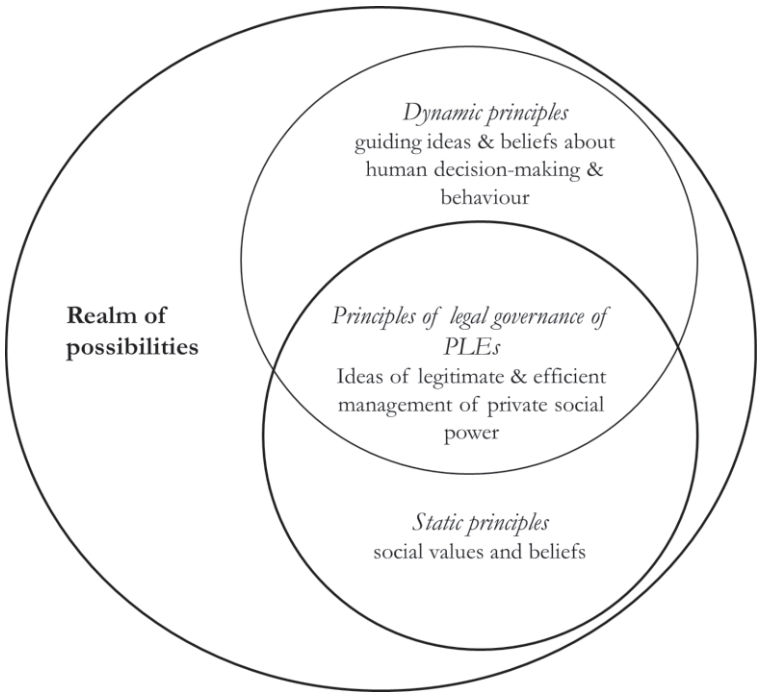
406 2003/C 321/01, [17]. Co-regulation takes place when non-governmental organisations and industry take part or is primarily responsible for creating norms, but public power then enforces it, which is why it is sometimes referred to as enforced self-regulation. (Määttä 2009, 138.)

on a voluntary basis'.[407] Corporate social responsibility often complements legal obligations.

> Being socially responsible means not only fulfilling legal expectations, but also going beyond compliance and investing "more" into human capital, the environment and the relations with stakeholders. [--] Going beyond basic legal obligations in the social area, e.g. training, working conditions, management-employee relations, can also have a direct impact on productivity. It opens a way of managing change and of reconciling social development with improved competitiveness.[408]

According to the European Commission, voluntary measures are taken by corporations 'to raise the standards of social development, environmental protection and respect of fundamental rights and embrace an open governance, reconciling interests of various stakeholders in an overall approach of quality and sustainability'

Figure 12. Realms of possibilities, legitimacy and efficacy in the legal governance of private law entities.



[407] COM/2001/0366 final, [20].

[408] Ibid., [21].

and with the expectation 'that the voluntary commitment they adopt will help to increase their profitability'.[409]

Hence, the principles of the ECSME are influential in the public management and legal governance of private law entities in the European Union. As static principles do not describe means, but rather objectives and values, the dynamic principles of the ECSM significantly influence the implementation of the static principles.[410]

Together, the static and dynamic principles establish the realm of possibility for legitimate and efficient public management of private law entities in the European economic system. The realms of legitimacy and efficacy contain the principles of legal governance of PLEs in the European Union. (Figure 12.) The research aims to find the least common denominators defining the legal powers of private corporate entities in the European Union. The fundamental principles of legal governance of private law entities are the first step in achieving this goal. The following chapter combines the recognition of sources and systematisation of private law entities' legal powers with the static and dynamic principles recognised or established by the Union. It aims to derive principles of legal governance of private law entities in general. Chapter 6.4 then aims to enhance the image by focusing on corporate entities, utilising the model of corporate legal personhood formulated in Chapter 5 to increase the depth of the general principles and their applicability on CEs.

6.3 Principles of Legal Governance of PLEs

6.3.1 Preliminary

This chapter aims to formulate general principles of legal governance of private law entities in the European Union. Each category of legal liberties and rights recognised in Chapter 5 is considered separately due to the disparate nature of the legal liberties

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[409] COM/2001/0366 final, Executive Summary, [1]. The underlying mechanism of enforcement of CSR is that markets are expected to encourage companies to behave responsibly, 'over and above their obligations to comply with their legal obligations'. (De Schutter 2008, 203.)

[410] As a principle, the steering of the economy in a socially acceptable direction by establishing common rules and avoiding direct intervention, for example, describe a means rather than an objective. It does not state anything about the proper balance, only that balance is something to be carefully considered. Neither does it say much about the measures to be adopted to steer the economy, only that direct intervention should be avoided, and instead common rules established.

and rights. The study begins with fundamental market liberties and general liberties and rights. It then proceeds to particular liberties and rights recognised or established by the Union. Finally, it provides a general principle of legal governance of fundamental non-market liberties and rights. The general principles are, inevitably, very abstract, particularly regarding fundamental non-market liberties and rights. However, the principles become more clearly defined once applied to corporate entities.

The formulation of a general principle proceeds in three steps: Firstly, it summarises the legal powers of PLEs and the grounds of positive and negative public intervention on those powers recognised in Chapter 4. Secondly, it connects the grounds forthe positive and negative public intervention with the static and dynamic principles of EU law and recognises the role of principled and pragmatic arguments in the legal governance of PLEs. The final step is to formulate a general principle on the legal governance of the particular category of liberties and rights of PLEs.

6.3.2 Formulating the Principles of the Legal Governance of PLEs

6.3.2.1 Legal Governance of Fundamental Market Liberties & Rights

1st Step: Legal Powers & Grounds for Intervention

As Chapter 4.3 described, fundamental market liberties include the freedom of contract, freedom to choose an occupation and the right to engage in work (Article 15 CFR), freedom to conduct business (Article 16 CFR) and the right to property, including intellectual property (Article 17 CFR). The right to be treated equally irrespective of gender, racial or ethnic origin, religion or belief, disability, age or sexual orientation (Article 3(3) TEU; Articles 8, 10 & 19 TFEU; Article 21 CFR) as a fundamental market right ensures the opportunity to enjoy fundamental market liberties.[411]

Chapter 4.3 also recognised that fundamental market liberties and rights and general liberties and rights. Negative intervention in fundamental market liberties and rights is possible on several grounds. Firstly, intervening in general liberties and

[411] In the framework of market economy, these liberties and rights are 'market powers'. In a non-market economy, they would carry a different name.

rights may be to protect the *proper functioning of the market*. Treaty provisions prohibiting restrictive agreements (Article 101 TFEU), abuse of dominant market position (Article 102 TFEU), and State aid (Article 107(1) TFEU) pursue this objective. The exercise of general liberties and rights in the markets is dependent on relative economic power. However, the decisive factor is the effects of the market position. According to the Court, '[a] finding that an undertaking has a dominant is not in itself a recrimination'. Instead, the actors with such a position have due diligence, that is, a 'special responsibility not to allow its conduct to impair genuine undistorted competition on the common market'.[412] The objective is to avoid excessive concentration of economic power and absolute monopolies.

Secondly, fundamental market liberties and rights may be restricted based on the *nature of the market activity*. For example, as solidarity market rights create rights for consumers and employees, they create corresponding legal duties for businesses and employers. These legal duties create restrictions on the ability of businesses and employers to enjoy their fundamental market liberties. It is also possible to segregate the nature of the activities based on the *market sector*. Sectors vital for general interests, such as the defence industry, the alcohol industry and health care industries, are often more strictly regulated on a national level.[413] Another particular sector where the EU and its Member States exercise legal governance is the environmental sector.[414] On the other hand, sectorsof particular importance for Union objectives are the financial and banking sectors. The European Central Bank may create regulations to implement its tasks and impose fines and periodic penalty payments. (Article 132 TFEU; Article 34 Protocol (No 4) TFEU). Article 127(6) TFEU establishes that the Council may 'confer specific tasks upon the European Central

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[412] Case 322/81 N*V Nederlandsche Banden Industrie Michelin v Commission of the European Communities* [1983] ECLI:EU:C:1983:313, Summary, [10]. Many of the principles adopted stemmed from the US model of anti-trust laws where the actual effects on the market were considered. Here an important view was that antitrust legislation should not support inefficient business activity. (See Maher 2011, 727; Lindberg 2015.) Different economic models assess the effects. The European Commission has been an active user of the so-called AEC test (as efficient competitor test). As the United States takes different approaches to analysing effect on competitiveness, this has caused disputes between the European Commission and corporations. (See e.g. C-413/14 P *Intel Corporation Inc. v European Commission* [2017] ECLI:EU:C:2017:808.) The European Court of Justice seems to have been more formal in its interpretations. However, the case law is inconsistent. (Lindberg 2015.)

[413] Cf. SGIs & SGEIs, see e.g. Finnish Alcohol Act (*Alkoholilaki* 1102/2017), Government Decree on Private Security Services (*Valtioneuvoston asetus yksityisistä turvallisuuspalveluista* 534/2002) Finnish Act on Military Equipment Export (*Laki puolustustarvikkeiden viennistä* 282/2012), Finnish Act on Private Health Care (*Laki yksityisestä terveydenhuollosta* 152/1990).

[414] Article 3(3) TEU. See above Ch. 4.3.2.2.

Bank concerning policies relating to the prudential supervision of credit institutions and other financial institutions with the exception of insurance undertakings'.[415]

2nd Step: Static and Dynamic Principles & Principled and Pragmatic Argumentation

While fundamental market liberties reflect static principles such as protecting individual autonomy, they describe the organisation of the economic system in a market economy. A market economy is an economic system which respects both the static principles of legitimacy and the dynamic principles of efficacy. The principles of ECSME described how the economy should be organised around the market to efficiently create and properly distribute wealth while simultaneously protecting the social value of individual liberty[416]. The principle of individual liberty is static, but fundamental market liberties and rights themselves are not. Although they are general liberties and rights appertaining to all autonomous entities, they are a means to an end and not ends in themselves. They may be intervened in with any efficient measure to support static principles, such as fundamental non-market liberties and rights or general interests. The dynamic principles of the ECSME provide the framework for the evaluation of the efficacy of measures.

Fundamental market liberties alone do not create principled arguments against negative intervention. The exercise of liberties is subject to pragmatic argumentation. Contractual freedom, for example, may be limited to protect competition.[417] The achievement of a dominant market position using fundamental market liberties does not create protection against public intervention if that position is abused. (Article 102 TFEU.) Abuse implies the evaluation of possible negative impacts on the economy. The principle of competition provides pragmatic arguments *against* unlimited freedom of contract and freedom of business, which may lead to excessive concentration of economic power through contracts or a dominant market position.

On the other hand, the efficient allocation of resources provides a pragmatic argument for the concentration of economic power through contractual cooperation or market dominance. The impact of a restrictive agreement on the competition can be assessed on a case-by-case basis against the benefit created by possible anticompetitive practices contributing to the production or distribution of goods or to promoting technical or economic progress (efficient allocation of resources) and allowing a fair share for the consumers (distribution of added value). (Article 101(3)

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[415] See also Article 25.1 Protocol (No 4) TFEU.

[416] Cf. Socialism as an economic model.

[417] See Article 101(1) TFEU.

TFEU.) Through these common *ex post* criteria, the Union avoids direct intervention in the economy while simultaneously promoting Union objectives and steering the economy towards a socially acceptable direction.

Negative intervention in fundamental market liberties is also possible for general interests recognised by the Union. These include static principles, such as protecting public morality, public security and the health and life of humans, animals, or plants.[418] As with the negative intervention on internal market liberties, the European Union ensures that Member States' actions are compatible with EU law. While social values and general interests are static principles and have intrinsic value, they need to be pragmatically justified to ensure that the measures adopted by the Member States do not arbitrarily violate the dynamic principles of the ECSME.[419] Pragmatic arguments may also be used to encourage fundamental market liberties when they are consistent with static principles. The principle of competition, for example, can be considered as both a legitimate and an efficient means of pursuing general interests regarding the eradication of poverty.

The principle of equal treatment creates a principled argument against both positive and negative discrimination of PLEs based on gender, racial or ethnic origin, religion or belief, disability, age or sexual orientation in economic relations. These qualities of PLEs are irrelevant for establishing contractual relations in the economic life sphere. The principle of equal treatment creates a principled argument against discrimination based on the personal qualities established. However, intervention is possible based on valid economic factors. The principle of non-discrimination does not prevent positive intervention in fundamental market liberties and rights, such as those creating internal market liberties and rights for a limited group of economic actors.[420] Neither does the principle of equal treatment create principled arguments against negative intervention based on economic power or nature of the market activity, as in the case of solidarity market rights establishing duties for business and employers. Public intervention in contractual freedom has its basis in pragmatic

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[418] See above Ch. 4.3.2.3.

[419] See e.g. C-198/14 *Visnapuu* ECLI:EU:C:2015:751 on the Alko monopoly of retail sale of alcoholic beverages in Finland.

[420] See e.g. Dir. 2005/36/EC on the recognition of professional qualifications according to which '[f]reedom of movement and the mutual recognition of the evidence of formal qualifications of doctors, nurses responsible for general care, dental practitioners, veterinary surgeons, midwives, pharmacists and architects should be based on the fundamental principle of automatic recognition of the evidence of formal qualifications on the basis of coordinated minimum conditions for training'. (Preliminaries, [19].)

arguments, that is, in the evaluation of the overall costs and benefits of such intervention.

3rd Step: Formulation of a Principle

Based on the above summary of legal powers and sources of legal duties for private law entities, and the recognition of the influence of static and dynamic principles in the legal governance of PLEs, and the role of principled and pragmatic arguments in the public intervention on the legal powers, the following general principle can be formulated.

> *Principle of Legal Governance of Fundamental Market Liberties & Rights*
>
> *All PLEs with economic power have fundamental market liberties and rights, in which intervention is possible by any efficient measure to support Union objectives, general interests and the liberties and rights of others, as far as the principle of non-discrimination is respected and fundamental non-market liberties and rights are protected.*

6.3.2.2 Legal Governance of Particular Liberties & Rights

1st Step: Legal Powers & Grounds for Intervention

As Chapter 4.3.1.2 recognised, internal market liberties include free movement of workers (Article 3(2) TEU; Articles 4(2)(a), 20–21, 26 and 45–48 TFEU), freedom of establishment (Articles 49(1) and 55 TFEU), and freedom to provide services (Articles 56 and 62 TFEU). Internal market rights derive from the principles of equal treatment, non-discrimination, mutual recognition, proportionality and transparency developed by the Court.[421] Internal market liberties are particular liberties (privileges), and internal market rights are particular rights.

Another group of particular legal powers recognised in Chapter 4.3.1.4 are solidarity market rights. Solidarity market rights are right of employees (Articles 5, 12, 27–28 & 30–31 CFR) and consumers (Articles 12 & 169 TFEU Article 38 CFR). While solidarity market rights stem from social values and, in the case of employee rights, the international obligation of the Member States, they also have an essential role in developing the internal market.

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[421] See C-325/91 *French Republic v Commission of the European Communities* [1993] ECLI:EU:C:2006:588; C-57/95 French *Republic v Commission of the European Communities* [1997] ECLI:EU:C:1997:164; C-303/90 [1991] ECLI:EU:C:1991:424.

The establishment of particular liberties and rights constitutes a positive intervention to general liberties and rights provided for every market actor. Limited groups of economic actors enjoy particular liberties and rights—access to these privileges and particular rights based on legally established and generally applicable *ex ante* criteria. According to Treaty law, enjoyment of internal market liberties depends on the anticipated contribution to the development of production and trade in the internal market (Article 50 TFEU). Only active persons and for-profit businesses currently enjoy internal market liberties and corresponding rights. Access to solidarity market rights, on the other hand, depends on the absolute market status of the actors as employees or consumers. The nature of the market activity determines whether a private law entity can access internal market liberties and rights (cross-border, value-adding). The nature of the activity also determines access to solidarity market rights (employee, consumer). However, employees and consumers as active market participants nevertheless contribute to the economy and internal market.

Internal market rights stem from the principles of equal treatment, non-discrimination, mutual recognition, proportionality and transparency developed by the Court.[422] Positive discrimination is, however, possible. The Union offers contractual privileges to actors contributing to its objectives, especially social objectives. The Union pursues economic and social objectives through the five European Structural and Investment Funds (ESIFs, or ESI Funds). The ESI Funds also provide funding for private undertakings. There are no pre-determined criteria for accessing funding, but the funding is based on a competition-like mechanism of application, where the applicants and their projects need to fulfil the established conditions to obtain public funding. This same logic applies to private undertakings receiving State aid based on economic or social development or protection of culture (Article 107(3) TFEU).[423] Actors supporting public policies may receive State funding without violating Article 107(1) TFEU prohibiting State aid. Private undertakings directly contributing to the attainment of public policy objectives are privileged by having access to public funding despite the general prohibition of State aid. Such private undertakings may also be connected to the advancement of economic, social and cultural rights, such as access to employment and education.

Negative intervention in the established privileges and particular rights stems primarily from general interests. Private law entities enjoying internal market liberties and rights may also have their liberties restricted based on public policy, public

[422] See above Ch. 4.3.1.2.

[423] See above Ch. 6.2.2.

security or public health.[424] Article 36 TFEU allows prohibitions and restrictions on grounds of public morality, public policy or public security; the protection of the health and life of humans, animals or plants, as well as to protect national treasures or industrial and commercial property. Neither positive nor negative intervention may discriminate on the basis of gender, racial or ethnic origin, religion or belief, disability, age or sexual orientation, or nationality. (Article 3(3) TEU; Articles 8, 10 & 19 TFEU; Article 21 CFR.)

2nd Step: Static and Dynamic Principles & Principled and Pragmatic Argumentation

The internal market liberties and rights connect strongly to the dynamic principles of the ECSME. The principle of organising the economy around competitive markets pervades the establishment of a European internal market. Establishing a competitive internal market is the source of the privileges and corresponding rights provided primarily for PLEs engaging in value-adding and cross-border economic activities. On the other hand, solidarity market rights stem from the static value of solidarity. Employee rights, in particular, are part of the international obligations of the Member States. The International Labour Law recognises the rights of employees. The United Nations Human Rights Convention confers several rights recognised as part of International Labour Law. For example, Article 23 of the Universal Declaration of Human Rights (1948) establishes the right to work, the right to equal and fair remuneration and the right to form and join trade unions. Solidarity market rights are, nevertheless, connected to the dynamic principles of the ECSME.

Providing particular rights for market actors in a weaker contractual position ensures that they also have sufficient access to the economic prosperity created by the market system. Solidarity market rights enhance the distributive nature of the competitive market and steer the economy in a socially acceptable direction. They are a means to an end and could be achieved through more direct public intervention. However, due to solidarity market rights, direct intervention in the economy is presumably less needed as solidarity market rights ensure that weaker parties benefit from contractual relations.

Through the creation of particular liberties and rights, the EU enhances the economic and social objectives of the Union.[425] Access to particular liberties and

[424] See above Ch. 4.3.2.3.

[425] Cf. Diplomatic immunity in international law, see above Ch. 2.2.2. States may also offer privileges and particular rights for actors considered to contribute to general interests.

rights for private law entities stems from their anticipated positive impact on the general interests of the Union and the achievement of Union objectives. In the case of internal market liberties and corresponding rights, this relation is reasonably straightforward. The anticipated positive impact is the development of the internal market. (Article 3(3) TEU; Article 50 TFEU.) In the case of solidarity market rights, the basis of particular rights is not so unequivocal. Solidarity market rights are consistent with static values recognised in the European Union, such as 'solidarity and mutual respect among peoples' and 'eradication of poverty'. (Article 3(5) TEU.) Simultaneously they contribute to the competition. By enhancing labour and consumer protection through solidarity market rights, the EU fosters transactions among cross-border consumers and labour markets.

Particular liberties and rights have no intrinsic value.[426] Nevertheless, intervention in internal market liberties and rights needs to be justified from the perspective of both static and dynamic principles. While static principles provide principled arguments for intervention, they need to be balanced considering the efficiency of the means. Intervention on the grounds of static principles needs to be pragmatically justified. The European Union supervises limitations to the freedom of movement so that they do not constitute unlawful protectionist measures. The measures adopted need as far as possible to follow the dynamic principles of the ECSME. Member States may subject the measures to preliminary evaluation by the Commission, and the Commission assesses whether the measures adopted are genuine and proportionate.

Limitations are not possible in the case of absolute rights. Absolute rights include, for example, the prohibition of torture.[427] Prohibition of slavery and forced labour (Art. 5 CFR) are absolute. To the extent that the solidarity market rights overlap with fundamental non-market rights, they afford stronger protection against negative public intervention than those not considered to be absolute rights. For the most part, however, solidarity market rights are not absolute. Non-absolute rights include, for example, the right to collective action.[428] As described by the Court in *Viking,*

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[426] See also Hesselink, Mak & Rutgers (2009, 9) who have highlighted how 'even consumer protection [--] although an official aim of the Union (Art. 3 EC), cannot itself justify an approximation of measure [--]'.

[427] The prohibition of torture was mentioned by the Commission as an example of absolute rights in its Communication establishing a strategy for the effective implementation of the Charter of Fundamental Rights by the European Union (COM/2010/0573 final, Preambles, [15]).

[428] ILO 1994 General Survey, [152].

the right to take collective action may be subject to restrictions.[429] The collective action must pursue 'a legitimate aim compatible with the Treaty and is justified by overriding reasons of public interest' and 'suitable for securing the attainment of the objective pursued and must not go beyond what is necessary in order to attain it'.[430] Also, as stated in Article 52(1) CFR, the rights and freedoms provided by the Charter may be limited 'if they are necessary and genuinely meet objectives of general interests recognised by the Union'. They can be negatively intervened with on a pragmatic basis to protect general interests and promote Union objectives, including the establishment of the internal market.

Employee rights are connected to the international obligations of the Member States. However, in the EU framework, the promotion of these rights stems from their positive contribution to the creation of the internal market. The Union distinguishes labour rights from other fundamental and human rights binding on the Member States because of their relevance in creating a common labour market. On the other hand, consumer rights as fundamental rights stem neither from the common constitutional tradition nor from the international obligations of the Member States. The Union has established consumer rights as fundamental rights to promote the creation of a common consumer market, albeit consumer rights reflect European social values.

The relation of solidarity market rights to the objectives of the Union subordinates them to pragmatic weighting, as in the case of *Viking,* where the rights to collective actions needed to be evaluated based on their impact on the establishment of the competitive internal market. As in *Viking,* the pragmatic argumentation adopted on the Union level may influence pre-established national laws or practices, which may have considered these rights more from a principled perspective.[431] The objective of the EU is to maximise the positive and minimise the negative impact of labour rights to the Union objective of achieving socially sustainable development while promoting freedom of movement. Promoting the common labour and consumer market is believed to be beneficial to employees and

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[429] C-438/05 *Viking* [2007] ECLI:EU:C:2007:772, [44]–[45]. Referring to cases C-36/02 *Omega* [2004] ECLI:EU:C:2004:614, [35], and C-112/00 *Schmidberger* [2003] ECLI:EU:C:2003:333, [74].

[430] C-438/05 *Viking* [2007] ECLI:EU:C:2007:772, [75]. Referring to cases C-55/94 *Gebhard* [1995] ECLI:EU:C:1995:411 [37], and C-415/93 *Bosman* [1995] ECLI:EU:C:1995:463, [104].

[431] If the European Union were to succeed in establishing a common social security system, it would distinguish those economic and social rights of individuals relevant to the establishment of a common social security system, and possibly rule out the non-relevant cultural rights. It would then proceed to evaluate those rights based on their utility to the achievement of an internal market. The rest would be left to the discretion of the Member States on how to distribute their limited resources to safeguard social values.

consumers, which justifies the lowering of protection of their rights to promote free movement as far as social sustainability is not endangered.

From the perspective of the European Union, there are no principled arguments against negative intervention in either internal market liberties and rights or solidarity market rights. As regards internal market liberties and the corresponding rights, the only arguments considered are the pragmatic ones stemming from the principles of the ECSME, including the principle of equal treatment regardless of nationality, which is particularly relevant in vertical relations between the State and business. The final evaluation criterion is the overall well-being of the right holders regarding the negative intervention in the solidarity market rights. Negative intervention is justified if this well-being remains the same or indirectly improves via access to the broader consumer and labour market.[432]

To the extent that solidarity market rights overlap with the absolute rights stemming from the common constitutional heritage or international obligations of the Member States, there are principled arguments against negative intervention. The prohibition of slavery and forced labour is the only absolute right among the solidarity market rights.

3rd Step: Formulation of a Principle

Based on the above summary of legal powers and sources of legal duties for private law entities, and the recognition of the influence of static and dynamic principles in the legal governance of PLEs, and the role of principled and pragmatic arguments in the public intervention on the legal powers, the following general principle can be formulated.

> *Principle of Legal Governance of Particular Liberties & Rights*
>
> *Particular liberties and rights may be established to grant privileged positions for certain types of private law entities pre-determined in the law concerning the nature of their activities based on their anticipated contribution to Union objectives, general interests recognised by the Union or fundamental non-market liberties and rights. These liberties and rights are open to intervention regarding any efficient measures in order to achieve Union objectives, to protect general interests or to promote fundamental non-market liberties and rights as far as absolute rights and the principle of non-discrimination are protected.*

[432] Positive intervention going beyond what is necessary to ensure social sustainability is also justified to promote the creation of a common consumer and labour market.

6.3.2.3 Legal Governance of Fundamental Non-Market Liberties & Rights

1st Step: Legal Powers & Grounds for Intervention

The fundamental non-market liberties include basic human rights, such as human dignity, the right to life, *et cetera*. (Articles 1–4 CFR.) Then there are civil rights and political rights, including the rights to liberty and security, respect for private and family life and freedom of expression and information. (Articles 6–12 & 39–40 CFR; Article 20 TEU.) Fundamental non-market rights consist of economic, social and cultural rights. These include access to benefits and social services, the right to access to preventive health care and access to SGEIs. (Articles 34–36 CFR.) The Union also respects cultural, religious and linguistic diversity and the rights of the elderly to participate in social and cultural life (Articles 22 and 25 CFR).[433]

Fundamental non-market liberties and rights recognised by the EU stem from constitutional traditions and international obligations common to the Member States.[434] The European Union does not primarily govern these liberties and rights, which is why the legal governance of fundamental non-market liberties and rights will be addressed only briefly, that is, to the extent that is necessary to determine the role of the principles of ECSME in the legal governance of PLEs and CEs in the EU.

While fundamental market liberties and rights extend inherently to every legally recognised member of the economic life sphere, fundamental non-market rights extend to every legally recognised member of the civil, social and (or) political life sphere. Article 1 of the Universal Declaration of Human Rights (UDHR), '[e]veryone is entitled to all the rights and freedoms set forth in this Declaration'. On this ground, every human being is inherently a member of the civil, social and political life sphere and the commercial life sphere. Hence, everyone is considered to have human dignity and have fundamental non-market liberties and rights.[435] Negative and positive intervention in fundamental non-market liberties is possible on grounds of protection of the individual, protection of the general interest and the protection of the liberties and rights of others.

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[433] See above Ch. 4.3.1.5.

[434] CFR, Preambles, [5].

[435] Basically, the UN Declaration implies that everyone has human dignity. On the basis of treatment of prisoners in the American detention facility, Guantanamo Bay, this implies that these individuals suspected ofterrorist crimes have *de facto* lost their human dignity and right to human rights. See e.g. Hoffman 2004; Schneider 2004.

Firstly, liberties and rights may be limited to protect other liberties and rights of the right-holder. For example, minors deemed to have limited rationality have limited autonomy to protect their well-being. Negative intervention is also possible on the grounds of recognised general interests, such as public security and public health.[436] Negative intervention is also possible to protect the liberties and rights of others. The person exercising their autonomy may not lead to another (involuntarily) losing their life, health or property. Criminal law protects human and civil rights. Voluntary domestic contracts, such as marital agreements or the decision to have a child, may result in maintenance duties. Outside duties stemming from the protection of civil rights and domestic contracts or statutory domestic relations, fundamental non-market liberties and rights do not create horizontal duties.

To the extent that non-market civil rights, such as the right to property, overlap with the fundamental market liberties, the decisive factor is whether the legal powers have been exercised in the commercial or non-commercial life sphere. In *Nold,* the Court interpreted the protection of private property through the framework of the social function of the business and the commercial nature of the property. What is critical is that the activity in question is essentially economic. Negative intervention in property rights stems from the public interest, that is, from the protection of the proper functioning of the economy.[437] If PLE exercises property rights in the economic (commercial) life sphere, Principle II formulated above applies.

Positive intervention in liberties may extend the field of individual autonomy on grounds, for example, of their contribution to important general interests. Positive intervention may also be the provision of social support. Individuals in a weaker position are given support on the grounds of the social value of solidarity. Social, economic and cultural rights provide a normative basis for such positive intervention.[438] Other manifestations of positive intervention include the rights of the child or the rights of persons with disabilities.[439]

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[436] See above Ch. 2.2.2 on Finnish conscription.

[437] Case 4/73 *Nold* [1974] ECLI:EU:C:1974:51, Summary, [3]. This can be seen to extend also to private individuals as regards their personal business. However, with proprietorships, the distinction between personal and business property is more ambiguous as with corporate entities and corporate holdings.

[438] Of course, there may be a difference in value between traditional freedom rights and economic, social and cultural rights, but this examination is omitted here. In many cases, the effective exercise and control of justice in practice is an obstacle to the exercise of economic, social and cultural rights. For example, the exclusion of economic, social and cultural rights from the ECHR was partly due to the goal of creating an effective international control system with individual rights of appeal. (Pellonpää 2005, 207.)

[439] See e.g. the UN Conventions on the Rights of the Child (A/RES/44/25) and Rights of Persons with Disabilities (A/RES/61/106).

Both non-market liberties and rights and the grounds of negative and positive intervention stem from static principles. Static principles reflect fundamental social values and beliefs. Fundamental non-market liberties and rights reflect values of individual freedom and autonomy, but also solidarity. Static principles establish the realm of possibilities in terms of legitimacy, which is why intervention in fundamental non-market liberties and rights is only feasible when this intervention finds its justification in other static principles.[440] Absolute rights, however, are not subject to interventions even on the grounds of other static principles.[441]

Public intervention in fundamental non-market liberties and rights requires *balancing* between static principles, whether they are principles establishing liberties and rights or principles recognising general interests. Principled arguments against negative intervention mainly stem from constitutional identity, common constitutional tradition and the international obligations of the Member States. Negative intervention in liberties and rights on the grounds of general interests, on the other hand, is influenced by the social situation and national priorities.

Even though argumentation for negative intervention in individual liberties to ensure public security in the case of compulsory military service may seem pragmatic, the decision is, however, between two competing values. While military service is a means to enhance national security, national security has a higher value than the conscript's autonomy to decide whether or not to perform military service. The decision is, hence, a value judgement. Other value judgements may concern public morality or the health and life of humans, animals, or plants. The fact that fundamental non-market liberties and rights establish principled arguments against pragmatic intervention does not mean that pragmatic arguments do not play a role

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[440] In this examination, the practical issues related to the efficient achievement of economic, social and cultural rights, such as limited resources, is not considered to diminish their static value. The static values of economic, social and cultural rights may be diminished if they are not interpreted as general rights belonging to every human being in need. The alternative is to interpret them as pragmatic rights where the rights do not stem from the individual right-holder, but from societal objectives. The right to education, for example, can be interpreted as a human right, in which case individuals have the right to education because they are human beings. It can also be interpreted as a means to improve national competitiveness, in which case individuals have the right to education because their education is expected to contribute to national interests. In the latter case, there would be no principled arguments against intervention in the right to education, particularly if the intervention has its grounds in national interests, such as efficient allocation of resources. The idea here is that access to rights is not, in principle, determined by an individual's contribution to society. Individual contribution can, nevertheless, be a weighting criterion and influence, for example, social security considerations.

[441] See Hautamäki 2011, 89.

in the process of balancing between individual liberties and rights and/or general interests.

The European Union expects the Member States to respect European values states in Article 2 TEU, including the 'respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights'. The respect for European values is ensured primarily through *ex ante* control. According to Article 49 TEU, '[a]ny European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union'. Membership of the Union is conditional upon fulfilling the eligibility criteria. In addition to having a functioning market democracy, the applicant country needs to have stable institutions guaranteeing democracy, the rule of law, human rights and the protection of minorities. The accession process includes the formulation of measures to be adopted in the prospective Member State to strengthen its institutions. After accession, the European Union does not, in principle, take a position on national value judgements.[442] The Union focuses on the efficient enforcement of its objectives.[443]

EU law does not establish static principles. The Union merely recognises those stemming from national or international sources. The dynamic principles of the EU alone do not justify intervention in fundamental non-market liberties and rights. However, the principles of the European Competitive Social Market Economy may indirectly influence the process of balancing. They provide pragmatic arguments for the tricky process of balancing between competing static principles. The dynamic principles of the ECSME have, for example, influenced the weighting between static principles of political rights in a democratic society and the protection of general interests.

The principle of ensuring stable economic growth and price stability has led to the transferring of monetary policy outside democratic control.[444] The loss of democratic rights has been considered a legitimate value judgment to protect general economic interests. Beliefs about the efficiency of democratic decision-making in

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[442] Since 2015, Poland and Hungary have adopted policies that run contrary to the European principle of rule of law. The EU has been slow to respond to the rule of law crisis. An official debate on how to enforce the rule of law was launched by the Commission on 17 July 2019. (See COM/2019/163 final.)

[443] Accession of the European Union to the European Convention on Human Rights (ECHR) is conditional upon the recognition of the specific characteristic of EU law, and to date the Court has not deemed accession agreements compatible with Article 6(2) TEU or with Protocol No 8 EU. (Opinion 2/13 of the Court, 18 December 2014, Digital reports.)

[444] See above Ch. 7.2.

steering monetary policy embedded in the principles of ECSME has, nevertheless, influenced this decision. Pragmatic arguments may also reconcile competing static principles. Solidarity market rights, for example, can be seen to reflect both static principles of autonomy and solidarity and the dynamic principle of steering the economy in a socially acceptable direction while avoiding direct intervention. Solidarity market rights promote social and economic rights by establishing horizontal legal duties but only when parties voluntarily use their autonomy to enter into a contractual relationship.

To summarise, pragmatic arguments stemming from the dynamic principles of the ECSME alone do not suffice for public intervention in fundamental non-market liberties and rights. Nor can they influence value judgements between static principles. Nevertheless, pragmatic arguments may influence the choice of efficient means when value judgments have been made or when reconciling between competing principles to eliminate antagonism.

3rd Step: Formulation of a Principle

Based on the above summary of legal powers and sources of legal duties for private law entities, and the recognition of the influence of static and dynamic principles in the legal governance of PLEs, and the role of principled and pragmatic arguments in the public intervention on the legal powers, the following general principle can be formulated.

> *Principle of Legal Governance of Fundamental Non-Market Liberties & Rights*
>
> *Fundamental non-market liberties and rights are static and belong to every person legally recognised as a member of the civil, political and (or) social life sphere. They may only be intervened in on the grounds of other static principles, that is, (a) other fundamental non-market liberties and rights of themselves, (b) the fundamental non-market liberties and rights of others, or (c) general interests recognised by the Union. Balancing between static principles is a value judgement made by society. The dynamic principles of the EU may indirectly influence the means and level of public intervention, but never contrary to the societal value judgement.*

6.3.3 Synthesis

The objective of this chapter has been to formulate general principles of legal governance of private law entities in the European Union. It formulated a principle for each category of liberties and rights and recognised the sources of public

intervention for each category of liberties and rights. The outcome of the analysis is summarised below:

Principle of Legal Governance of Fundamental Market Liberties & Rights

All PLEs with economic power have fundamental market liberties and rights, in which intervention is possible by any efficient measure to support Union objectives, general interests and the liberties and rights of others, as far as the principle of non-discrimination is respected and fundamental non-market liberties and rights are protected.

Principle of Legal Governance of Particular Liberties & Rights

Particular liberties and rights may be established to grant privileged positions for certain types of private law entities pre-determined in the law concerning the nature of their activities based on their anticipated contribution to Union objectives, general interests recognised by the Union or fundamental non-market liberties and rights. These liberties and rights are open to intervention regarding any efficient measures in order to achieve Union objectives, to protect general interests or to promote fundamental non-market liberties and rights as far as absolute rights and the principle of non-discrimination are protected.

Principle of Legal Governance of Fundamental Non-Market Liberties & Rights

Fundamental non-market liberties and rights are static and belong to every person legally recognised as a member of the civil, political and (or) social life sphere. They may only be intervened in on the grounds of other static principles, that is, (a) other fundamental non-market liberties and rights of themselves, (b) the fundamental non-market liberties and rights of others, or (c) general interests recognised by the Union. Balancing between static principles is a value judgement made by society. The dynamic principles of the EU may indirectly influence the means and level of public intervention, but never contrary to the societal value judgement.

6.4 The Principles of Legal Governance of CEs

6.4.1 Preliminary

This chapter aims to identify general principles governing the legal powers and legal relations of corporate entities in the European Union. It takes the general principles of legal governance of private law entities and combines them with the model of corporate legal personhood formulated in Chapter 5.

Chapter 5.4 argued that corporate entities are autonomous legal entities only through recognition in law. It also established that CEs do not enjoythe same legal powers as natural persons. Instead, their liberties and rights are limited to those necessary for their economic function. Corporate entities as autonomous legal entities exist only in the commercial life sphere. Nevertheless, a corporate entity is the creation of a contract between associated members, whether natural or legal persons, even when the law provides them with legal autonomy. They are ultimately the product of natural persons exercising their contractual freedom. Statutory legislation recognising the corporate entity as an autonomous entity merely adds a surplus of legal personhood. This surplus is, in essence, a positive intervention by the State in the pursuit of State interests.

The principles of the legal governance of CEs consider these features of corporations as legal persons. Therefore, the principles of the legal governance of CEs will have more depth than the principles concerning private law entities generally, even though they will remain abstract. The objective here is to recognise the *least common denominators* in the legal governance of corporations.[445]

The principles formulated below consider the recognition of corporate entities as autonomous legal persons, the extent and limits of their legal powers and their relations to the associated natural persons holding fundamental non-market liberties and rights.

[445] The latter parts of the study will provide more substance by studying the legal governance of CEs during the financial and economic crisis (2008–2014) and identifying key factors that determine the legal powers and legal relations of CEs in the framework of EU legal system.

6.4.2 Formulating the Principles of Legal Governance of CEs

6.4.2.1 Principle I

The first principle concerns the establishment of legal autonomy for corporate entities and the limits of their legal personhood. According to Article 54(1) TFEU

> Companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Union shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States.

As the autonomy of a corporate entity is granted by law, and by law, it can also be taken away. Organisations, such as corporations, political parties and other associations with different purposes, may acquire legal autonomy to exercise that purpose.[446] If the organisation is not practising its purpose, or its purpose is contrary to general morality, it can be nullified. While natural persons may be punished for illegalities, they cannot be deprived of their legal personhood. On the other hand, there is no static principle against depriving autonomous associations recognised by law of their legal personhood as a penalty for illicit activities. However, as corporate entities are entities created by law, the law stipulates whether or not the CE should be liable for violating social rules and values. Ultimately such responsibility rests with the natural persons operating within the CE with the sense of morality, which CEs as autonomous entities are lacking because they are inanimate, i.e., artificial.

A corporate entity established by a contract between the associated entities can be recognised as an autonomous entity exercising economic activities if it fulfils the criteria established by law. Corporate entities are economic entities, considered by law to engage in business activities, irrespective of whether it is for-profit or not-for-profit. Endowing the corporate entity with legal autonomy and legal powers is necessary to the efficient pursuit of business.[447] Endowing the corporate entity with

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[446] See above Ch. 6.4.2.

[447] This does not exclude the possibility of a CE having, for example, political power. It is not, however, considered a political entity which should have political power. The recognition and regulation of possible political power considers whether CEs can act as intermediators of the political interests of the associated natural persons. In the EU, the political power of CEs is indirectly recognised, but as CEs are considered *de jure* to be non-political entities, the regulation of their de facto political power relies on measures which avoid the recognition of CEs as political entities because the implications of such recognition could be significant. However, for this reason attempts to regulate the political power exercised through CEs remain vulnerable to criticism due to inefficiency of measures to tackle the political power of business entities. See below Ch. 10.

legal powers distinguishable from the legal powers of the associated entities stems from the benefits created for the economy. The concentration of economic power in larger units enhances economic efficiency. The ability of the CE to act as an individual entity reduces transaction costs, particularly regardingthe establishment of commercial and other contractual relations. In the case of limited companies, where the shareholders are not personally liable for the company's liabilities, the objective is to encourage investment and economic growth.

If the purpose of the associated entity is not to practice business, it is not, by definition, a corporate entity, even if registered as such. If the CE does not engage in business activities, its legal powers are without legal validity. When it has not practised business, liabilities adopted by the CE are liabilities of the associated natural persons with full legal powers outside the commercial life sphere. To formulate the outcome in the form of a principle:

> *Principle I*
>
> *Associations may be provided with legal personhood to pursue some appropriate societal purpose. The legal personhood of the association is limited to the life sphere necessary for that purpose.*
>
> *Corporate entities may be provided with separate legal personhood limited to the commercial life sphere to enhance economic efficiency and transactions. The legal personhood of a corporate entity may be removed or considered invalid if (a) it does not practise its purpose, i.e., business, or (b) its practices harm the general interests or are contrary to social values.*

6.4.2.2 Principle II

The principle outlines the primary principle defining the basis of legal powers for corporate entities. Corporate entities as legal persons recognised by law as business entities have the legal powers necessary to conduct business. They are private law entities with economic power, enjoying fundamental market liberties and rights. As legally recognised business entities, CEs have access to fundamental market liberties and rights. The European Union recognises CEs to hold fundamental market liberties and rights appropriate to their nature as non-natural persons.

Fundamental market liberties include freedom of contract, freedom to choose an occupation and the right to engage in work, freedom to conduct business and the right to property, including intellectual property.[448] As corporate entities are associations, they may not enjoy the freedom to choose an occupation and the right

[448] See above Ch. 4.3.1.3.

to engage in work *per se*. However, corporate entities may enjoy the freedom to conduct business as well as the right to property.[449]

The fundamental market right is the right to be treated equally irrespective of gender, racial or ethnic origin, religion or belief, disability, age or sexual orientation. According to European values of human dignity, freedom, equality, and solidarity, these personal qualities are irrelevant in market relations.[450] Corporate entities, however, do not have such properties. Nevertheless, the properties of corporate entities as business entities are all relevant, including the nature of their business activity and market sector. The fundamental condition is that corporate entities cannot be discriminated against unless they are discriminated against in the internal market on grounds of nationality.

Chapter 6.3.2.1 derived a principle of the legal governance of fundamental market liberties and rights of private law entities. According to this principle, intervention on fundamental market liberties and rights 'is possible by any efficient measure to support Union objectives, general interests and the liberties and rights of others, as far as the principle of non-discrimination is respected and fundamental non-market liberties and rights are protected'. It is to be noted that efficacy means not only producing the desired effect but also doing so without excessive use of power. The nature of corporate entities as purely economic entities obviates the necessity to consider the protection of the principle of non-discrimination or fundamental non-market liberties or rights. In the Union framework, the decisive factor in determining the legal powers of corporate entities is the efficacy of measures.

> *Principle II*
>
> *The legal powers of corporate entities include the liberties and rights necessary for acting in the commercial life sphere. As market entities, corporate entities enjoy fundamental market liberties and rights. The fundamental market liberties and rights of corporate entities may be challenged to any efficient measure to support Union objectives, general interests recognised by the Union, or the fundamental non-market liberties and rights of natural persons.*

As CEs have been granted legal autonomy because of their anticipated positive contribution to the economy, intervention in their fundamental market liberties depends on the evaluation of costs and benefits. Corporate behaviour can be challenged on any measure in which the benefits of intervention outweigh the costs. The evaluation of costs and benefits takes place in the framework of the dynamic principles of the European Union, highlighting stable economic growth, competition

[449] See above Ch. 5.3.1.

[450] See above Ch. 5.3.2.

and steering markets in a socially acceptable direction while avoiding direct intervention.[451]

6.4.2.3 Principle III

The third principle considers the recognition of privileges for corporate entities. As a basic assumption, fundamental market liberties and rights appertain to every private law entity in the economic life sphere. On the other hand, privileges and specific rights constitute a positive intervention in fundamental market liberties.

The European Union establishes particular liberties and rights for PLEs. The privileges recognised by the Union are internal market liberties. Internal market liberties include free movement of workers, freedom of establishment and freedom to provide services. Internal market rights as particular rights aim at the efficient enforcement of Treaty-established internal market liberties. Internal market rights are rights derived from the principles of equal treatment, non-discrimination, mutual recognition, proportionality and transparency. Another group of particular rights established by the Union is the solidarity market rights, which aim to ensure that consumers and employees have access to the benefits created by the internal consumer and labour market.[452]

As Chapter 5.3.1 established, while CEs do not enjoy solidarity market rights, for-profit corporate entities enjoy appropriate internal market liberties. Due to their nature as associations, CEs enjoy freedom of establishment and freedom to provide services. For-profit CEs also enjoy the rights derived from the principles of equal treatment, non-discrimination, mutual recognition, proportionality and transparency.

According to Chapter 6.3.2.2, the legal governance of particular liberties and rights is based on the idea that they 'may be established to grant privileged position for certain types of private law entities pre-determined in the law concerning the nature of their activities based on their expected contribution to Union objectives'. In the case of corporations, the privileged position established through internal market liberties stems from the contribution of CEs to the attainment of Union objectives, particularly the establishment of a competitive internal market. As Chapter 4.4.2.2 discussed, for-profit corporate entities and 'active persons' enjoy the

[451] See above Chs. 6.2.2 & 6.3.2.2.

[452] See above Chs. 4.3.1.4 & 4.4.2.3.

privileges and corresponding rights of the internal market because they generate economic added value.

According to Chapter 6.3.2.2, the particular liberties and rights 'are open to intervention regarding any efficient measures in order to achieve Union objectives, to protect general interests or to promote fundamental non-market liberties and rights as far as absolute rights and the principle of non-discrimination are protected'. Here 'absolute right' refers to those solidarity market rights which coincide with human rights, that is, the prohibition of slavery and forced labour.[453] As corporate entities do not enjoy human rights, it is unnecessary to consider the impact of regulation on absolute rights overlapping with solidarity market rights. Neither is it necessary to consider whether intervention is discriminatory on grounds of gender, racial or ethnic origin, religion or belief, disability, age or sexual orientation as corporate entities do not possess these qualities.[454] The only possible ground for discrimination in the case of CEs is nationality. The principle of non-discrimination ensures equal treatment in the internal market for public procurement, i.e., that 'traders, of whatever origin, have equal access to contracts put out to tender'.[455]

As opposed to the case of natural persons enjoying solidarity market rights coinciding with absolute rights, there are no principled arguments against negative intervention on the privileges provided for corporate entities. The privileges and particular rights of corporate entities not contributing to the achievement of a competitive internal market may be challenged to any measure if the benefits of the intervention outweigh the costs.

As Chapter 4.3.2.3 showed, public intervention in internal market liberties and rights is justified on the grounds of public policy, public security and public health. As Chapter 6.2.2 established, both for-profit and non-profit businesses have access to contractual privileges in the form of State aid or ESI Funds. These contractual privileges are acceptable when the benefits outweigh the costs of the intervention . The benefits may be measured in terms of economic, social and cultural development. They may also positively impact the fundamental non-market liberties and rights of natural persons, such as their social, economic, and cultural rights.

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[453] See above Ch. 5.3.1.

[454] Non-discrimination on the grounds of the personal features listed in Article 21 CFR reflect a societal value choice aiming to ensure that economic relations are not dependent on the gender, age or religion of the actor. In the case of CEs, discrimination on grounds of nationality, on the other hand, stems from ideas of how to efficiently organise the economy around a competitive internal market.

[455] Case T-258/06 *Germany v European Commission* [2010] ECR ECLI:EU:T:2010:214, Summary of the Judgment, [4].

Principle III

Corporate entities may have legal or contractual privileges and corresponding rights to support Union objectives or general interests recognised by the Union. The particular liberties and rights of the corporate entity are open to intervention regarding any efficient measures to achieve Union objectives or to protect general interests recognised by the Union or to promote the fundamental non-market liberties and rights of natural persons.

Legal and contractual privileges and particular rights constitute a positive intervention at the base level of the legal powers endowed with fundamental market liberties and rights. Therefore, there are no principled arguments against negative intervention. However, the measures adopted need to be efficient. Concerning internal market liberties in particular, the requirement of efficiency means that the measures adopted may not constitute disguised protectionism.[456] Again, the evaluation of the efficacy of measures takes place in the framework of the dynamic principles of the ECSME. Hence, while there are no principled arguments against establishing legal duties for corporate entities on the grounds of general interests recognised by the Union or fundamental non-market liberties and rights of natural persons, there may well be strong pragmatic objections.

6.4.2.4 Principle IV

The fourth and final principle recognises the connection between corporate entities and the associated natural persons. It acknowledges the possible influence of the legal governance of CEs on the legal liberties and rights of the associated natural persons, whether managers, shareholders, employees or customers. This principle considers the possible direct or indirect impact of the measures adopted to legally govern corporate entities on the fundamental non-market liberties and rights of natural persons.

Principles I–III formulated above outlined that there are no principled arguments against negative intervention with the general or particular liberties and rights of CEs. To the extent that public intervention influences the legal powers of the

[456] Various economic models may be used to assess the impacts both ex ante and ex post. Competing models may produce different outcomes. Models are also always approximations of reality. Changing the model used will necessarily change the balance between the anticipated costs and benefits, which creates dynamic changes in the policies.[456] The underlying dynamic principles, nevertheless, prevail. Referring to the principles of ECSME as 'dynamic' does not mean that they could not be as 'static' as static principles. Rather, the term 'dynamic' refers to the relation between the principle and its impact on legal governance.

associated natural persons, the decisive factor is whether the natural persons are exercising their legal powers in the commercial or the non-commercial life sphere. When exercising legal powers is limited to the commercial life sphere, public intervention in the liberties and rights of both natural and legal persons may be grounded on the pragmatic arguments stemming from the dynamic principles.[457] Suppose the liberties and rights exercised in the commercial life-sphere overlap with legal liberties and rights exercised in the non-commercial life sphere, and the measures adopted constitute a negative intervention with the liberties and rights in question. In that case, the intervention needs to be justified on the grounds of both dynamic and static principles. Negative intervention in the fundamental non-market liberties and rights of natural persons needs to be justified with either general interest recognised by the Union or the fundamental non-market liberties and rights of themselves or others, where 'themselves and others' refers to *natural* persons.[458]

As seen in principles I–III, the positive and negative intervention in the liberties and rights of CEs often stem from static principles, including the existence of corporate entities as autonomous entities. Static principles do not prevent negative intervention in the legal powers of CEs. Neither do static principles *necessitate* either positive or negative intervention in the legal powers of CEs to protect static principles, including the protection of the fundamental non-market liberties and rights of natural persons.

In the framework of the model of corporate legal personhood established in Chapter 5.4, corporate entities as autonomous legal entities do not, for example, have the physical capability to commit murder. Nor do CEs have the mental capacity to will such an act, even if they did not themselves commit the act . This lack of capacity renders it unnecessary to establish liability for CEs in order to protect general interests or the liberties and rights of natural persons. It suffices to establish legal liability for the natural persons, with the capacity for intentions and interests and the ability to operate according to those intentions and interests. On the other hand, the fact that acts can be both willed and enforced by human operators alone does not create a principled argument against the legal liability of CEs.[459] As the legal

[457] See above Ch. 6.3.2.1.

[458] See above Ch. 6.3.2.3.

[459] This statement is consistent with principles I–III.

personhood of non-human operators stems from legal acts, the same legal acts can endow them with liabilities.[460]

> *Principle IV*
>
> *The legal governance of corporate entities may not intervene with the fundamental non-market liberties and rights of the associated natural persons unless justified on grounds of general interests recognised by the Union or the fundamental non-market liberties and rights of themselves or other natural persons. Measures intervening in the fundamental non-market liberties and rights of natural persons must be necessary, proportional and efficient.*

According to the general principle of human rights law, 'necessary' means that the intervention in fundamental non-market liberties and rights is required to achieve the desired objective and cannot be achieved by any other means. 'Proportional' in the context of EU law refers to the principle of proportionality regulating the relationship between the Union and the Member States. However, 'proportional' refers here to the proportionality of the intervention in fundamental non-market liberties and rights in relation to the legitimate objective pursued.[461] On the other hand, the efficiency of measures refers to costs and benefits. Like Principles II and III, Principle IV also highlights the efficiency of measures when imposing legal liabilities on corporate entities irrespective of the nature of the liability. Like Principle I, Principle IV recognises that corporate entities do not enjoy fundamental non-market liberties and rights.

6.4.3 Synthesis

This chapter took the model of corporate legal personhood in the European Union developed in Chapter 5 and the general principles of legal governance of private law entities developed in Chapter 6.3 and combined them to formulate general principles of legal governance of corporate entities. The first principle concerned the establishment of legal autonomy for CEs and the limits of their legal personhood. The second principle defined the basis of legal powers for CEs. The third principle outlined the provision of CEs with privileges and particular rights. The fourth and final principle recognised the connection between CEs and the associated natural

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[460] A case in point is State responsibilities. States are considered to have responsibilities under customary international law. See e.g. Draft articles on Responsibility of States for internationally wrongful acts by International Law Commission (2001).

[461] See e.g. C-101/12 *Herbert Schaible v Land Baden-Württemberg* [2013] .ECLI:EU:C:2013:661, Summary of the Judgment, 3.1, [3].

persons. It acknowledges the possible indirect influence on natural persons and their fundamental non-market liberties and rights to the legal governance of CEs. The principles recognised are as follows:

Principle I

Associations may be provided with legal personhood to pursue some appropriate societal purpose. The legal personhood of the association is limited to the life sphere necessary for that purpose.

Corporate entities may be provided with separate legal personhood limited to the commercial life sphere to enhance economic efficiency and transactions. The legal personhood of a corporate entity may be removed or considered invalid if (a) it does not practise its purpose, i.e., business, or (b) its practices harm the general interests or are contrary to social values.

Principle II

The legal powers of corporate entities include the liberties and rights necessary for acting in the commercial life sphere. As market entities, corporate entities enjoy fundamental market liberties and rights. The fundamental market liberties and rights of corporate entities may be challenged to any efficient measure to support Union objectives, general interests recognised by the Union, or the fundamental non-market liberties and rights of natural persons.

Principle III

Corporate entities may have legal or contractual privileges and corresponding rights to support Union objectives or general interests recognised by the Union. The particular liberties and rights of the corporate entity are open to intervention regarding any efficient measures to achieve Union objectives or to protect general interests recognised by the Union or to promote the fundamental non-market liberties and rights of natural persons.

Principle IV

The legal governance of corporate entities may not intervene with the fundamental non-market liberties and rights of the associated natural persons unless justified on grounds of general interests recognised by the Union or the fundamental non-market liberties and rights of themselves or other natural persons. Measures intervening in the fundamental non-market liberties and rights of natural persons must be necessary, proportional and efficient.

6.5 Summary & Conclusions

Understanding the wider context is essential to understand the legal powers and legal relations of corporate entities in the European Union framework. This context is the

ideas, beliefs and values embedded in the legal system. These ideas, beliefs and values are reflected by the static and dynamic principles, where static principles reflect fundamental social values and beliefs and dynamic principles reflect ideas and beliefs about the efficacy of policy measures, such as legislation. Static principles establish the realm of possibilities in terms of legitimacy, and dynamic principles the realm of efficacy.

As described in Article 2 TEU, the Union is founded on respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights. These establish a sphere of individual autonomy and are sources of principled arguments against public intervention on the liberties and rights of natural persons. On the other hand, static principles such as solidarity and equality are sources of positive rights for individuals and principled arguments for public intervention to secure real equality. Static principles also justify public intervention based on general moral or general interests, such as protecting the environment or public security.

Static principles recognised by the Union stem from the common constitutional traditions and international obligations of the Member States. Dynamic principles, on the other hand, are established by the Union. They reflect ideas stemming from *Soziale Marktwirtschaft,* the doctrine of Social Market Economy originating from post-World War II Germany, which recognised that efficient and fair economic governance is based on (1) stable economic growth and price stability, (2) market competition and (3) steering the economy in a socially acceptable direction by laying down common rules and avoiding direct intervention. These dynamic principles of the European Competitive Social Market are embedded in the primary legislation of the EU. Together with the static principles recognised by the Union; they create the realm of possibility for legitimate and efficient public management. This realm contains the principles of legal governance of private law entities in the European Union.

Chapter 6.3 formulated three parallel principles of legal governance of private law entities in the EU. The first principle was the *principle of the legal governance of fundamental market liberties and rights*. This general principle states that all PLEs with economic power have fundamental market liberties and rights. These liberties and rights may are open to intervention regarding any efficient measure to support Union objectives or general interests as far as the principle of non-discrimination are respected and fundamental non-market liberties and rights are protected.

The second principle was the *principle of legal governance of particular liberties and rights*. According to this principle, particular liberties and rights may be established to grant a privileged position to certain types of private law entities pre-determined in the law

concerning the nature of their activities according to their anticipated contribution to Union objectives. These liberties and rights are open to intervention regarding any efficient measures to achieve Union objectives, protect general interests or promote fundamental non-market liberties and rights as far as absolute rights and the principle of non-discrimination are protected.

The third principle briefly described the influence of the European Union on the *legal governance of fundamental non-market liberties and rights* stemming from the constitutional traditions and international obligations of the Member States. Under this principle, the fundamental non-market liberties and rights are static and belong to every person legally recognised as a member of the civil, political and (or) social life sphere. They may only be challangedon the grounds of other static principles, that is, (a) other fundamental non-market liberties and rights in themselves, (b) the fundamental non-market liberties and rights of others, or (c) general interests recognised by the Union.

The European Union participates in the general discussion on human rights. Primarily, however, the influence of the EU on the legal governance of PLEs is exercised through the dynamic principles of the European Competitive Social Market Economy. Because of its competencies in the regulation of economic life, the dynamic principles of the EU influence the legal governance of private law entities. However, as corporations as legal entities are purely economic entities, it is to be expected that the influence of the EU in the legal governance of corporate entities is significant and that the role played by the dynamic principles of the European Competitive Social Market Economy in determining their legal powers and legal relations is substantial.

The objective of Chapter 6.4 was to focus on the legal governance of corporate entities and provide a clearer picture of the legal governance of CEs based on the model of corporate legal personhood. On the other hand, this model was built on the systematisation of the legal powers of CEs provided by Chapter 5.3. According to this model, corporate entities are autonomous legal entities only through their recognition of law. Statutory legislation recognising the corporate entity as an autonomous entity adds a surplus of legal personhood. The liberties and rights of CEs are limited to those necessary for their economic function in society. The limitation of the liberties and rights of CEs to the commercial life sphere essentially rules out the necessity to consider fundamental non-market liberties and rights.

Combined with the general principles of legal governance of private law entities, Chapter 6.4 laid down the four fundamental principles of the legal governance of corporate entities. According to Principle I, *associations may be provided with legal*

personhood to pursue a suitable societal purpose. The legal personhood of the association is limited to the life sphere necessary for their purpose. As corporate entities have the social function of doing business, they *may be provided with separate legal personhood limited to the economic life sphere to enhance economic efficiency and transactions.* According to this principle, the *legal personhood of a corporate entity may be removed or considered invalid if (a) it does not practice its purpose,namely business, or (b) its practices the general interests or are contrary to social values.*

Principle II established the basic legal powers of corporate entities. According to this principle, *the legal powers of corporate entities include the liberties and rights necessary for acting in the commercial life-sphere*, meaning that *corporate entities as market entities enjoy fundamental market liberties and rights.* Principle II also established that *the fundamental market liberties and rights of CEs are open to intervention regarding any efficient measure to support Union objectives, general interests recognised by the Union, or the fundamental non-market liberties and rights of natural persons.*

Principle III established the basis of the particular liberties and rights of CEs. It stated that *corporate entities may enjoy legal or contractual privileges and the corresponding rights to support Union objectives or general interests recognised by the Union*. It also states that *the particular liberties and rights of the corporate entity are open to intervention regarding any efficient measures to achieve Union objectives or to protect general interests recognised by the Union or promote fundamental non-market liberties and the rights of natural persons.*

While corporate entities do not enjoy fundamental non-market liberties and rights, the final principle recognised the corporation's relation to the associated natural persons and the need to safeguard their liberties and rights. Hence, Principle IV established that the legal governance of corporate entities may not intervene in the fundamental non-market liberties and rights of the associated natural persons unless justified on grounds of general interests recognised by the Union or the fundamental non-market liberties *rights of themselves or other natural persons*. It also recognised that *the measures intervening in the fundamental non-market liberties and rights of natural persons must be necessary, proportional and efficient.*

The principles governing the legal powers of corporate entities recognised here are on a high level of abstraction. In isolation, they provide some framework but not a substantial understanding for the legal powers of corporate entities in the European Union. The following part of the research will provide more detail. First, it systematises and analyses policy measures adopted in response to the challenges posed and perpetuated by the financial and economic crisis. Secondly, it studies the impact of secondary legislation adopted vis-à-vis the legal powers of corporations. Finally, by applying the models of corporate legal personhood and legal power

developed in Part II, it identifies key variables determining the legal powers and legal relations of corporate entities in the framework of the EU legal system applicable in all economic and social situations.

PART III ANALYSIS

7 MANAGING THE CRISIS IN THE EU

The chapter introduces the policy measures adopted to respond to the challenges posed and perpetuated by the financial and economic crisis. It systematises a significant part of the most significant regulatory measures adopted between 2008 and 2014 and in early 2015. Chapter 7.2 divides the regulatory measures into four groups: (1) measures aimed to respond to the causes and immediate consequences of the financial crisis, (2) measures aimed to share the burden of the crisis, and (3) distribute benefits, and (4) measures promoting socially sustainable business. Chapter 7.3 then systematises the regulatory measures in terms of the use of policy instruments. Policy analysis recognises the use of sanctions, economic incentives and information to steer market actors' behaviour. The outcome is that the Union adopted hard law measures in the banking and financial sector, taxation and in the protection of workers. In areas of protection of human rights and the promotion of other social objectives, on the other hand, the regulation aims to provide a framework for informed decision-making and competition-based economic incentives.

7.1 Introduction

A key characteristic of the modern global market economy is the flow of economic cycles, periods of economic growth and economic *recession*. When economic growth turns into an economic recession, growth slows and employment falls. Major economic recessions are *depressions*. Sometimes the economy creates 'bubbles'. Economic bubble means that the asset around which the bubble is formed has a high price range, which then rapidly contracts. The Tulipomania of the 1630s Holland is the first recorded economic bubble. The so-called Dot-Com bubble of the 1990s is another famous bubble.[462] Economic bubble, hence, refers to unrealistic pricing of a future asset. The asset's price exceeds its value, and the quick falling of prices restores the economic balance. A recession may become a depression when complemented with the bursting of a bubble. This is what took place in the late 2000s.

The financial crisis began in the real estate sector in the United States. The real estate business had created a housing bubble or a real estate bubble, with high

[462] Investopedia. At: https://www.investopedia.com/terms/b/bubble.asp. Accessed on 18 September 2018.

expectations of the development of real estate value. On the other hand, the financial sector had developed complicated financial instruments that intertwined housing, insurance, commercial banking and other financial activities. The complex financial instruments hid the real value of estates and risks related to mortgages.[463]

Because of the global interconnectedness of the financial sector, the bursting of the housing bubble influenced economies worldwide. Moreover, because of the interdependence of the financial sector and the real economy, the crisis influenced the everyday lives of ordinary individuals by influencing the production of goods and services. While periods of economic growth and recession come and go, the financial crisis of 2007−2008 drove many countries into the worst economic recession in decades.[464] The crisis influenced the economic system of the European Union on multiple levels. While making the economic situation more complicated, it challenged the principles on which the Union was founded.

Since the establishment of the Coal and Steel Community, the history of the European Union has been one of peace through economic integration and by establishing an internal market where goods and services move more freely across borders. According to Article 26(2) of the Treaty on European Union (TEU)

> The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties.

The objective of the internal market was to increase the welfare of all Europeans. Indeed, the review of the achievement of the single markets published in 2007 stated how the single market had increased welfare by € 518 per head compared to the situation without the single market.[465] Also, the single market provided Europeans with a wider choice of high-quality goods and services and, in many cases, lower prices.[466] However, the financial and economic crisis challenged all this.

The level of unemployment rose across Europe. Simultaneously, governments had to cut spending on social and health services. Because of the independent monetary policy and rules of fiscal stability, the Member States have limited public expenditure. The EU Member States borrow from the financial markets. They need to maintain fiscal stability in order to secure future access to financing. Simultaneously, because of the importance of the banking system and the business

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[463] See European Commission 2009, 8.

[464] Huwart & Verdier 2013, 126–130.

[465] SEC/2007/1521 final, 1.1, [2].

[466] Ibid., 1.1, [6]–[7].

sector, the Member States provided aid for banks and support firms in the productive sector.[467] To support the competitiveness and stability of their national economies, the Member States were unable to increase public expenditure on social services with the level of rising unemployment. The impact of the economic crisis on the lives of ordinary citizens was especially hard in countries unable to access funding from the financial markets. In addition, these EU countries faced a sovereign debt crisis.[468] The well-being of citizens deteriorated significantly in these countries, challenging the principles of the Union on a fundamental level. The political pressure against the Union grew. Member States struggling with their economy and supporting their firms were on a slippery slope towards protectionism.[469] At the core of the Union, this raised the question of how to ensure economic integration.

According to Article 17(1) TEU, the Commission 'shall promote the general interest of the Union and take appropriate initiatives to that end' and 'ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them'. The Commission is tasked with ensuring the continuity of the internal market and economic integration. In a situation where dissatisfaction towards the Union and its principles had grown, it needed to act.

This chapter outlines the regulatory measures adopted in response to the challenges raised and reinforced by the financial and economic crisis. The focus is on regulation affecting the legal status of private law entities. The examination excludes regulatory measures affecting only the legal status and legal relations of the Union and its Member States. It covers addresses the most significant legislative act adopted during the examination period, including regulations, directives, decisions and inter-institutional agreements. It also covers some implementing acts adopted by the Commission to ensure fair competition between businesses. The examination focuses on measures taken between 2008 and 2014 since the financial crisis

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[467] See Kassim & Lyons 2013.

[468] Also known as the European debt crisis, or the eurozone crisis, which occurred due to the financial and banking crisis as '[g]overnments that had grown accustomed to borrowing large amounts each year to finance their budgets and that had accumulated massive debts in the process, suddenly found markets less willing to keep lending to them.' (Source: Economic and Financial Affairs: Why did the Crisis Happen?

http://ec.europa.eu/economy_finance/explained/the_financial_and_economic_crisis/why_did_the_crisis_happen/index_en.htm, Accessed on 27 October 2016.) During the sovereign debt crisis several Member States, such as Greece and Portugal, were unable to pay their national debts or access funding from the financial markets. As a condition for inter-European lending, strict macroeconomic programmes were established. See 2011/734/EU; COM/2012/0739 final.

[469] See Kassim & Lyons 2013.

continued to reveal its severity until the return to economic growth.[470] This analysis covers measures where the Union has exclusive, shared or supportive competencies.[471] The chapter also considers Commission Communications to underline the reasoning behind the measures adopted and their connection to the wider context.[472]

As Chapter 1.2 described, the recent literature has studied the regulatory measures adopted due to the crisis. However, a general systematisation of the measures adopted is required to identify the key factors determining the legal powers and legal relations of CEs in the framework of the EU legal system. Therefore, this chapter aims to systematise the regulatory measures and provide a policy analysis. Chapter 8 then continues by analysing the impact of the crisis on the legal powers and legal relations of corporate entities.

This chapter proceeds as follows: Chapter 7.2 outlines the key measures adopted to overcome the financial and economic crisis. Next, it systematises the measures adopted in response to the challenges posed and perpetuated by the crisis. Finally, it divides the measures into four groups: (1) measures aiming to address the causes and immediate consequences of the financial crisis, (2) measures aiming to share the burden of the crisis and (3) distribute benefits and (4) measures promoting socially sustainable business.

Chapter 7.3 then presents a policy analysis of regulatory measures. It determines whether the regulatory measures adopted establish norms and sanctions prohibiting specific types of behaviour or whether it enables economic incentives or information to steer decision-making. Contemporary public management research classifies policy instruments into regulation, economic means and information. These policy instruments are also referred to as 'sticks, carrots and sermons', where sanctions complement regulation.[473] While regulation is coercive, 'carrots' and 'sermon' aim to steer individuals in the right decision by providing positive incentives or information.[474]

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[470] On research methods and data, see Chapter 3 above.

[471] See Articles 3–4 and 6 TFEU.

[472] While Article 14(1) TEU states how the European Parliament exercises political control, and Article 15(1) TEU establishes that the European Council defined the general political directions and priorities, the crisis period was challenging to political consensus. The European Commission played a key role in outlining the policy responses.

[473] Ibid.

[474] Such policies assume that individuals formulate decisions to maximise utility even if their rationality is limited. Whether stick, carrot or sermon, policies may compensate for limited rationality and

7.2 Policy Measures Adopted in Response to Crisis

7.2.1 General Strategy for Overcoming the Crisis

On 7 October 2008, the Economic and Financial Affairs Council of the European Union (ECOFIN) reached a conclusion where it undertook to 'take all necessary measures to enhance the soundness and stability of our banking system and to protect the deposits of individual savers'.[475] These measures included State aid to banks and other relevant financial institutions.[476] The 2008 banking communication was just the first in a series of several related communications.[477] The recapitalisation of banks was a reactive response to the financial crisis. The underlying reasons for the crisis include the structure of the financial and banking sector, short-termism, poor risk management, lack of responsibility, and the weakness of the supervisory and regulatory framework.[478] As described by the European Commission:

> Due to the particular nature of the current problems in the financial sector such measures may have to extend beyond the stabilisation of individual financial institutions and include general schemes.[479]

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enhance the decision-making of individuals for better outcomes. The underlying assumption with 'stick, carrot and sermon' is that individual preferences are static. Sanctions, rewards or information may modify the decision-making and behaviour of individuals influencing the outcomes. These measures are not, however, expected to influence their preferences. Instead of believing that individual preferences are static, this research recognises the bidirectional relation between the legal sphere and the social sphere and that legal institutions can shape individual preferences through the process of socialisation. See above Ch. 3.1. This means that successful institutions can shape individual preferences. (Peters 2001 [1999], 44.) Legal rules can change social ideas, values and beliefs. Even without sanctions, the law influences how individual members of society think about what is true and what is right. (See Lowdes & Roberts 2013; Peters 2001 [1999]; Chilton 2004; Wilson 1990; Sornig 1989; Charteris-Black 2005; Schmidt 2008; Schmidt 2014; Ulen 2014; Chong 2013; Baron 2014a & 2014b.) While social values are reflected in the legislative process, legislation may also influence social values. According to *Jyrki Tala,* legislation steers values and moral beliefs. (Tala 2005, 116–117.) In addition to legal rules and sanctions, this research acknowledges that legislation may also influence the preferences of individuals and modify their behaviour not only through rules but also through practices and narratives, even though the focus of the research is on behaviour-steering mechanisms that rely on incentives.

[475] PRESS RELEASE 13784/08.

[476] See 2008/C 270/02.

[477] See e.g. 2009/C 195/04; COM/2010/0254 final; and C(2011) 8744 final.

[478] See COM/2010/0301 final.

[479] 2008/C 270/02, 1, [4].

Measures extending beyond immediate responses aimed at building a 'comprehensive financial reform' to address the issues mentioned above.[480] For a more long-term solution, in 2010, it was decided to establish a Bank Resolution Fund (BRF).[481] The Commission presented the legislative proposal for creating the BRF in 2012.[482] On 15 April 2014, the European Parliament adopted the Bank Recovery and Resolution Directive (BRRD). As of 1 January 2015, all Member States had to apply a single rulebook to resolve the issues of banks and large investment firms, as prescribed by the BRRD. The new rules harmonised and improved the tools for dealing with bank crises across the EU, aiming to secure the free movement of capital.

Regulation implemented concerns crisis prevention[483], early intervention[484] and crisis management. The establishment of the European Banking Union, the Single Supervisory Mechanism (SSM) and the Single Resolution Mechanism (SRM) was a significant part of securing the internal market for financial and banking services. One central principle in the establishment of the SSM was the prevention of future state intervention. The regulation adopted entailed strengthening bank capital and liquidity, establishing an effective resolution regime for depositor protection, more effective overseeing and supervision, ending the too-big-to-fail phenomenon, risks posed by shadow banking, and preventing and sanctioning market abuse.[485]

Despite the measures adopted, the impact of the financial and banking crisis on the real economy was significant. The crisis slowed down the financing of new businesses and investments, which are essential for economic growth. Increased unemployment meant growing pressure for public expenditure but decreased amount of tax revenue. Unemployment further magnified the pre-existing structural issues of European economies, including an ageing population and declining

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480 COM/2010/0301 final, 1, [3].

481 See COM/2010/0254 final.

482 See COM/2012/0280 final.

483 CRD4, Single Supervisor, and EBA, ESMA, EIOPA. The EU tightened supervision of the financial markets by establishing a European System of Financial Supervisors (ESFS) composed of three European Supervisory Authorities (ESAs) – the European Banking Authority (EBA), the European Insurance and Occupational Pensions Authority (EIOPA) and the European Securities and Markets Authority (ESMA) – and of a macro-prudential watchdog, the European Systemic Risk Board (ESRB). The three ESAs work together with Member States' national supervisory authorities to ensure harmonised rules and a strict and coherent implementation of the new requirements. The ESRB monitors threats to the stability of the whole of the financial system, allowing any weaknesses to be addressed in due time. Credit Rating Agencies, which played an important role in triggering the crisis, are now closely supervised by ESMA. See Reg. (EC) No 1060/2009.

484 See e.g. Reg. (EU) No 806/2014.

485 E.g. Directive 2009/14/EC; Directive 2013/36/EU; Reg. (EU) No 575/2013.

competitiveness of traditional industry, all of which came on top of increased government to aid the banks. Between October 2008 and October 2012, the Commission approved aid to the financial sector totalling € 5 058.9 billion, corresponding to 40.3% of the entire EU's GDP.[486] This *bailout* meant transferance of monetary resources from the public sector to the banking sector, ultimately funded by regular taxpayers.

During the crisis, the Member States recapitalised banks with public resources to ensure that the financial and banking sector would not collapse. However, these public resources were taken from the counter-cyclical measures often undertaken by states in the face of economic recession. As outlined by the Directorate-General for Economic and Financial Affairs, the governments needed to use their limited resources to ensure economic recovery and growth to avoid long-term recession in an economic downturn.[487] However, increased unemployment created a heavy financial burden on the public sector, with ever more limited resources.

The Lisbon strategy adopted in 2000 recognised the challenges pre-dating the crisis. In 2010, the European Commission Working Group evaluated the Lisbon strategy. The group considered whether the framework established in the strategy was sufficient. The evaluation revealed several shortfalls. One of these was that increased employment did not consistently increase or even ensure an adequate living standard. The underlying reason was labour market segmentation.[488] As a result, the Commission introduced a new strategy. '*Europe 2020 - A European Strategy for Smart, Sustainable and Inclusive Growth' (Europe 2020) was adopted in March 2010.[489]

The Europe 2020 outlined several multi-sectoral flagship initiatives.[490] The primary long-term objective was to exit the crisis and ensure economic growth, and the flagship initiatives consisted of several different measures and instruments.[491] Some initiatives were a direct continuance of the Lisbon strategy, such as those

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[486] SWD/2012/443 final, 3.1.2, [3].

[487] European Commission 2009.

[488] See SEC/2010/0114 final.

[489] See COM/2010/2020 final; COM/2005/0024 final.

[490] 'Innovation Union', 'Youth on the move', 'A digital agenda for Europe', 'Resource efficient Europe', 'An industrial policy for the globalisation era', 'An agenda for new skills and jobs', and 'European platform against poverty'. See COM/2010/2020 final.

[491] For example, the flagship initiative named 'European Platform Against Poverty' included the transformation of open method coordination on social exclusion and social protection into a platform for cooperation, peer-review and exchange of best practices in order to foster commitment by public and private players to reduce social exclusion.

promoting investments in research and development (R&D), innovations, labour market reform, sustaining social cohesion, developing a business environment and greening European energy policy. However, several new instruments were added to expedite economically, socially and environmentally sustainable recovery.

After launching Europe 2020, however, new challenges arose. The sovereign debt crisis challenged yet again the stability of the banking system. It also made the economic situation more complicated.

The Commission addressed these issues in its communication 'A Roadmap to Stability and Growth' published in 2011.[492] The roadmap emphasised the necessity and urgency of measures proposed in Europe 2020 while adding details on implementing the initiatives. Soon after, the Commission published 'A Single Market Act'.[493] This Act recognised several shortcomings in the existing market system, including market fragmentation, obstacles to the movement of services, obstacles to innovation and creativity, lack of citizens' confidence in the internal market and how the benefits were transferred to consumers. The Single Market Act included twelve levels for boosting growth and strengthening confidence related to internal market development.[494] The common objective in all measures was to secure the development achieved.

The following analysis looks at the regulatory measures taken in response to the financial and economic crisis, dividing these measures into three groups. The first group of measures are those taken in response to the causes of the crisis in the banking and financial sector. The second group of measures adopted aims to share the direct and indirect costs of the financial and economic crisis and distribute the wealth created at the market. The third group of measures related to securing the ethical conduct and social sustainability of the business.

7.2.2 Responding to the Causes of the Crisis

Before the crisis, the focus on the financial and banking sector was on removing internal market obstacles.[495] With free movement of capital as a principle, Article 65 TFEU protects the rights of the Member States to protect the prudential supervision

[492] COM/2011/0669 final.

[493] COM/2011/0206 final.

[494] Ibid., 1, [4].

[495] See above Ch. 4.2.

of financial institutions.[496] It has been the task of the CJEU to evaluate whether measures adopted to supervise financial institutions are justified intervention with the free movement of capital. The Court has not readily accepted restriction on the free movement of capital based on prudential supervision of financial institutions.[497] On the other hand, the Commission evaluated that prudential supervision did not require harmonised legislation. Supervisory cooperation was considered sufficient to ensure the proper functioning of financial institutions when creating an internal market for financial and banking services.[498] Creating a true Banking Union began with a crisis and developed as time passed.[499]

When the financial crisis hit, the regulatory response was swift. In November 2008, a group chaired by Jacques de Larosière was mandated to examine possible improvements to the supervision and regulation of the financial and banking sector.[500] Recommendations by the working group were followed by several Commission Decisions[501], which were later replaced or repealed by Council Regulation or Directives.[502] The Larosière report was referred to when the European Supervisory Authority (ESA) implemented regulation concerning derivatives and securities, transparency requirements and remuneration policies, and also when harmonising financial market regulation and regulation on market abuse.[503]

To patch up the 'shortcomings in financial supervision'[504], the EU tightened supervision of the financial markets by establishing a European System of Financial Supervisors (ESFS). The System is composed of three European Supervisory Authorities (ESAs): the European Banking Authority (EBA)[505], the European

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[496] See Craig & de Búrca 2015, 772–773. See also Directive 88/361/EEC, Articles 1–4.

[497] Craig & de Búrca 2015, 725. See e.g. C-478/98 *Commission of the European Communities v Kingdom of Belgium* [2000] ECLI:EU:C:2000:497.

[498] See SEC/2007/1521, 2.5, [3].

[499] See also Council Reg. (EU) No 1024/2013.

[500] A technical framework for measures was also provided by the High-level Expert Group on reforming the structure of the EU banking sector, which was established by Commissioner Michel Barnier in February 2012 with the task of assessing whether additional reforms were directly targeted at the structure of individual banks. The Group, which was chaired by Erkki Liikanen, published its final report on 2 October 2012 (See High-level Expert Group's final report 2012). The proposals of this group were more long-spanned than those of the Larosière group and not so relevant in the period of this study.

[501] See e.g. 2009/78/EC; Decision No 716/2009/EC.

[502] See e.g. Reg. (EU) No 1093/2010; Reg. (EU) No 648/2012; Dir. 2010/73/EU; Dir. 2014/65/EU; Dir. 2014/57/EU.

[503] See COM/2010/2020 final, 4.2, [2–5].

[504] Reg. (EU) No 1093/2010, Preambles, [1].

[505] See Reg. (EU) No 1093/2010.

Insurance and Occupational Pensions Authority (EIOPA)[506] and the European Securities and Markets Authority (ESMA)[507] as well as the European Systemic Risk Board (ESRB)[508].

The three ESAs work together with Member States' national supervisory authorities to ensure harmonised rules and strict and coherent implementation of the new requirements. The ESRB monitors threats to the stability of the entire financial system, allowing any weaknesses to be tackled in due time. In this system, credit rating agencies, which are private institutions, are closely supervised by ESMA. National authorities remain responsible for day-to-day supervision, while Regulation (EU) No 1093/2010 aims at 'upgrading the quality and consistency of national supervision and strengthening oversight of cross-border groups'.[509] The supervision includes performing stress tests on banks. The banks themselves fund the tests. In addition, burden-sharing by shareholders and subordinated creditors and the introduction of the financial transaction tax in 11 Member States aims at covering not only the social costs of the future but also the current crisis.[510]

Revisions were made and regulations were adopted at a fast pace. The Commission proposed around 30 new rules to better regulate, supervise and govern the financial sector 'so that future taxpayers will not foot the bill when banks make mistakes'.[511] Regulation addressed strengthening bank capital and liquidity, effective resolution regime for depositor protection, more effective surveillance and supervision, ending the too-big-to-fail phenomenon, risks posed by shadow banking, and preventing and sanctioning market abuse.

When the crisis continued, and tensions in sovereign debt markets escalated in 2011, the Heads of State or Government agreed on a 'banking package'. This package restored confidence in the banking sector by guaranteeing medium-term funding and creating a temporary capital buffer amounting to a capital ratio of 9% of the highest quality capital after accounting for a market valuation of sovereign debt exposures.[512]

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[506] See Reg. (EU) No 1094/2010.

[507] See Reg. (EU) No 1095/2010.

[508] See Reg. (EU) No 1092/2010.

[509] Reg. (EU) No 1093/2010, Preambles, [5].

[510] See SWD/2013/028 final. The principle of 'polluter pays', familiar from environmental law, seems to apply.

[511] MEMO/14/294, 1, [1].

[512] Statement of EU Heads of State or Governance 26 October 2011, Brussels.

Additional policy requirements concerning remuneration in the financial and banking sector were issued in 2013 to correct policies conducive to excess risk-taking, including the adoption of a 'comply or explain' policy. Although the remuneration policy issued by the European Commission is not mandatory, it requires those actors *not* following the guidelines to explain *why* they are not following the policy.[513]

On 29 January 2014, the European Commission adopted a proposal for a regulation to stop the biggest banks from engaging in the risky activity of proprietary trading. The new rules would also give supervisors the power to require those banks to separate certain potentially risky trading activities from their deposit-taking business if pursuing such activities compromise financial stability.[514] However, this proposal was withdrawn by the Commission in 2018, along with several other proposals.[515]

The Asset Quality Review (AQR) addresses non-transparency of the balance sheets of banks and their overall risk situation. In AQR, the European Central Bank thoroughly reviewed the balance sheets and risk profiles for the Single Supervisory Mechanism's (SSM) operational start in late 2014. AQR had three main goals. The first goal was to increase transparency by enhancing the quality of information available concerning the condition of banks. The second goal was to repair by identifying and implementing necessary corrective actions, if and where needed. Finally, the third goal was to build confidence by assuring all stakeholders that banks were fundamentally sound and trustworthy.[516]

7.2.3 Sharing Costs

The measures described above addressed the immediate consequences and the root causes of the financial crisis. The objective was to establish a system where the banking and financial institutions would respond to possible imbalances without public aid. Related measures with more profound implications on the legal status of financial and banking institutions, their owners, managers and investors were also adopted. These measures include (a) the establishment of Financial Transaction Tax, which would be used to meet the costs of the current crisis; (b) the establishment of

513 Dir. (EU) 2017/828; Additional recommendations on enforcing policy, see 2014/208/EU.

514 COM/2014/043 final.

515 2018/C 233/05.

516 See e.g. European Central Bank 2013.

the Resolution Fund, which would be the source for financing possible future crisis; and (c) combatting tax evasion to ensure contributions from both business and private persons .

(a)-(b) Resolution Fund & Financial Transaction Tax

The regulation adopted included measures to ensure that banks would pay for future banking failures instead of ordinary taxpayers.[517] On 15 April 2014, the European Parliament adopted the Bank Recovery and Resolution Directive, which requires the Member States to apply a single rulebook for the resolution of banks and large investment firms and establish a national resolution fund financed in advance by credit institutions and investment firms. These funds are used to finance the restructuring of a failing bank.[518] The regulation required burden-sharing by shareholders, junior capital holders and subordinated creditors before granting restructuring aid.[519] The Single Resolution Mechanism (SRM) was established to secure the proper functioning of the banking and financial sector. To discourage excessive risk-taking and moral hazard[520], the SRM has significant authority to intervene with the operations of the financial institutions.[521]

The issue of who pays the costs of the current crisis nevertheless remained. As described by the European Commission, '[t]here is a strong consensus within Europe and internationally that the financial sector should contribute more fairly given the costs of dealing with the crisis and the current under-taxation of the sector.'[522]

The financial transaction tax is a prime example of measures adopted during the crisis that are not directly linked to the financial and economic crisis but instead to the economic and moral consequences of the crisis. In its proposal for a Council

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[517] See e.g. COM/2010/0254 final.

[518] COM/2012/0280 final. Regulation accepted as (EU) No 648/2012.

[519] 2013/C 216/01, Introduction, [19].

[520] Moral hazard as a term refers to excess risk-taking when one is aware that the costs will be paid by someone else should the risks materialise. For those providing banking and financial services this means that regulation has been deemed necessary to ensure that the costs of the risks would be carried by the institutions and that the costs of excessive risks with potential to destabilise the financial system, would be too much. (See e.g. 2008/C 270/02; 2013/C 216/01; COM/2013/0520 final; 2013/C 216/01; COM/2010/0254 final.) The moral hazard issue arose during the financial and banking crisis. (See e.g. COM/2010/0254 final.)

[521] See e.g. Dir. 2014/59/EU; Reg. (EU) No 1093/2010; Reg. (EU) No 648/2012.

[522] COM/2011/0594 final, 1.1, [1].

Directive implementing enhanced cooperation in the area of financial transaction tax, the Commission stated how

> [--] the recent global economic and financial crisis had a serious impact on our economies and the public finances. The financial sector has played a major role in causing the economic crisis whilst governments and European citizens at large have borne the cost. There is a strong consensus within Europe and internationally that the financial sector should contribute more fairly given the costs of dealing with the crisis and the current under-taxation of the sector.[523]

The under-taxation of the financial sector justified the long-term economic and vast geographical coverage of financial transaction tax.[524]

The original proposal for a common system of Financial Transaction Tax (FTT) tabled by the Commission on 28 September 2011[525] was rejected by the Council. Henceforth the financial transaction was advanced in the framework of *enhanced cooperation*. The Treaty on European Union states that if at least nine of the Member States wish to establish enhanced cooperation, they shall notify the European Parliament, the Council and the Commission accordingly.[526] Concerning the FTT, the Commission submitted a proposal to the Council for authorising enhanced cooperation in the area of financial transaction tax at the request of eleven Member States: Austria, Belgium, Estonia, France, Germany, Greece, Italy, Portugal, Slovakia, Slovenia and Spain. The enhanced cooperation was authorised on 22 January 2013. The Council Directive for implementing enhanced cooperation in the area of FTT also included measures against tax avoidance.[527] The preliminary estimates indicate that the tax revenues could be in the order of magnitude of 31 billion euros annually.[528]

When the purpose of the financial transaction tax was to finance the societal costs of market failure and negative externalities, taxation was brought forward in a broader context.

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[523] COM/2013/071 final, 1.1, [1].

[524] See COM/2013/071 final.

[525] See COM/2011/0594 final.

[526] See Art. 20(2) & Art. 329(1) TEU. For examples of enhanced coordination see e.g. Council Reg. (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, Reg. (EU) No 1257/2012 of the European Parliament and of the Council of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection.

[527] See COM/2013/071 final, 1.3, [4].

[528] COM/2013/071 final, 4, [1].

(c) Tax Monitoring & Tax Evasion

Tax planning and tax avoidance have a significant impact on State financing. They also affect how fair the division of tax burden seems in the eyes of the wider audience. For example, before the economic crisis, it was common knowledge that economic actors from companies to private individuals used free movement and freedom of establishment to minimise taxes. During the crisis, however, tax avoidance was brought front and centre.

The Council adopted the original directive on the common taxation system applicable in the case of parent companies and subsidiaries of different Member States in 1990.[529] It focused on tackling double taxation, *i.e.* situations where the taxpayer would pay taxes twice onthe same income . The original directive does not even mention the issue of non-taxation. During 2014–2015, the Council and Parliament adopted two directives dealing with withholding taxes.[530] These directives paid particular attention to financial transactions between parent companies and subsidiaries and artificial financial transactions with the sole purpose of avoiding taxation.[531]

Several measures were adopted to encourage the Member States to cooperate and exchange information. The scope of the actions taken covers *all* taxes, except Value Added Tax, customs duties, excise duties and compulsory social contributions already covered by other Union legislation on administrative cooperation. Measures adopted aimed to ensure that EU standards for transparency and exchange of information on request comply with international standards. Member States may no longer refuse to supply information solely because a bank or other institution holds the requested information. Automatic exchange of information was expected from 1 January 2015 onwards on five categories of income and capital based on available information: income from employment, director's fees, life insurance products not covered by other directives, pensions, and ownership of and income from immovable property. These measures also aim to improve the existing mechanisms for exchanging information by introducing a deadline for information exchange procedures.[532]

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[529] Council Dir. 90/435/EEC.

[530] See Council Dir. 2014/86/EU; Council Dir**.** (EU) 2015/121.

[531] Dir. 2011/96/EU, Preambles, [3].

[532] See Council Dir. 2011/96/EU replacing the decades old Council Dir. 77/799/EC. See also Commission Implementing Reg. (EU) No 1156/2012, and Dir. 2011/16/EU.

This framework of cooperation likewise soon proved inadequate. As part of the intensified fight against tax evasion, on 12 June 2013, the Commission proposed extensions to the automatic exchange of information between tax administrations.[533] Later the Commission also proposed an amendment on the Directive of a common taxation system applicable in the case of parent companies and subsidiaries of different Member States. The objective was to ensure that taxpayers do not abuse the directive.[534] According to the proposal, the Member States 'apply domestic or agreement-based provisions aimed at tackling tax evasion, tax fraud or abusive practices in general'.[535] The directive itself aims to strengthen the ability of the Member States to apply their domestic or agreement-based provisions on the prevention of tax evasion, tax fraud or abuse.[536]

In the area of indirect taxation, the Union adopted measures to tackle the avoidance of Value Added Tax (VAT). According to the definition proposed by the European Commission, value added tax is '[a] general tax that applies, in principle, to all commercial activities involving the production and distribution of goods and the provision of services'. VAT is 'a consumption tax because it is borne ultimately by the final consumer'.[537] On 7 October 2010, the Council adopted Regulation (EU) No 904/2010 on administrative cooperation and fraud-combating in the area of the VAT in order to support efficient tax collection and combatting tax fraud. In 2011, the European Commission adopted a Communication outlining further measures to ensure the simplicity, efficiency and fraud-proofness of the European VAT system. The Commission stated how more attention was required to design an effective, efficient and fairer tax system and that this was particularly true of the EU VAT system.[538] Furthermore, the Council of Europe stressed how 'Value Added Tax constitutes a major source of revenue for the national budgets and reform of the current EU VAT system should' in addition to previously mentioned goals, 'contribute to fiscal consolidation and growth'.[539] Following measures included, for example, setting up a group of experts on value-added tax, *i.e.* the VAT Expert Group.[540]

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[533] See COM/2013/0348 final.

[534] See COM/2013/0814 final.

[535] COM/2013/0814 final, 3, [7]. See also Council Dir. 2014/86/EU, Preambles, [2].

[536] Council Dir. (EU) 2015/121, [5], [9].

[537] What is VAT? https://ec.europa.eu/taxation_customs/business/vat/what-is-vat_en (Accessed on 22 December 2018).

[538] COM/2011/0851 final, Introduction, [2].

[539] PRESS RELEASE 9733/12. See also 2013/C 258 E/07, Preambles, [1].

[540] See 2012/C 188/02.

The fight against tax evasion also relates to issues of smuggling and counterfeiting, both of which reduce taxable income and especially VAT revenue. Regulation reorganising the European Anti-Fraud Office (OLAF) also provided the office with a broader mandate to study the illegal trade in counterfeit cigarettes and tobacco products and other counterfeit goods entering the EU.[541]

The Commission also re-evaluated its long-standing practices concerning tax rulings.[542] Tax rulings are instruments whereby tax authorities accept a tax base for a specific company that deviates from the tax base required by law. According to Margrethe Vestager, European Commissioner for Competition, this favourable calculation of taxes 'may give the company a more favourable treatment than what other companies would normally get under the country's tax rules, and this could constitute State aid.'[543] The investigations have targeted major multinational corporations with well-known brands such as *Apple, Starbucks, Fiat, Amazon* and *McDonald's.*[544]

7.2.4 Distributing Benefits

While measures were taken to sharethe costs of the financial and economic crisis, the situation raised questions about how the benefits created by the market were to be distributed. The insufficient distribution was tackled with several measures intended to enhance competition and solidarity market rights, including measures (a) tackling market abuse so that the markets would benefit the consumers, (b) supporting small and medium-sized enterprises and social enterprises, (c) protecting posted workers, (d) empowering consumers and (e) protecting passive and minority shareholders.

(a) Market Abuse

The European Commission supervises competition and has powers to investigate and impose fines for anti-competitive behaviours, such as price-fixing and abuse of dominant market position. In 2014, the Commission published a brief

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[541] See Dir. 2014/62/EU; Reg. (EU) No 883/2013; Reg. (EU) No 608/2013; Commission Implementing Reg. (EU) No 1352/2013.

[542] See COM/2012/0722 final; C(2012) 8806 final; C(2012) 8805 final.

[543] STATEMENT/14/1480, [1].

[544] See e.g. IP/14/1105; IP/14/663; IP/14/1105; IP/15/6221.

Communication evaluating past achievements and future perspectives, highlighting the need to enhance the effectiveness of sanctions to 'achieve a high level of voluntary convergence'.[545] The effectiveness was achieved by ensuring that the National Competition Authorities (NCAs) had sufficient powers to impose fines. In addition to sanctions, the Union adopted a policy of publishing recognised violations.[546]

Adopting the Market Abuse Regulation (EU) 596/2014 strengthened administrative sanctions for market abuses. It also strengthened the investigative powers of national authorities to detect abuses on financial markets. Alongside this regulation on market abuse, the Union adopted a Directive on criminal sanctions for market abuse. This directive introduced strict criminal sanctions for intentional market abuse to 'demonstrate a stronger form of social disapproval'.[547] Directive 2014/65/EU on markets in financial instruments aimed to respond to challenges concerning market abuse stemming from technological development, including high-frequency trading (HFT).[548]

To the extent that competition law alone was insufficient to ensurea fair distribution of benefits, the Union adopted measures to enhance the position of consumers and posted workers. Simultaneously these measures paved the way for further integrating the internal market and access to markets for small and medium-sized enterprises.

(b) Small and Medium-sized Enterprises, Social Enterprises & Access to Markets

Another group of measures taken to tackle the issues created by imperfect competition aims to strengthen the market position of new business sectors and small and medium-sized enterprises, (SMEs). The high threshold to access the markets for small businesses was already recognised in the 2005 Lisbon strategy. Before realising the real economic impact of the financial crisis, the Commission in 'A Small Business Act for Europe' (2008) had called on Member States to adopt measures to reduce the administrative burden of small and medium-sized enterprises

[545] COM/2014/0453 final, [36].

[546] Dir. 2014/57/EU, Preambles [6].

[547] Ibid.

[548] In HFT decisions in the markets are made by computers and happen in milliseconds, creating big market movements sometimes without any reason. HFT also provides considerable competitive advantage for traders using HFT. (High-Frequency Trading - HFT Definition: https://www.investopedia.com/terms/h/high-frequency-trading.asp. Accessed on 26 April 2019.)

and enhance their access to finance.[549] Measures aiming to improve the competitive position of SMEs included, for example, the 'Think Small First – the Small Business Act for Europe'[550], as well as the 'European Code of Best Practice'[551]. These aimed to make public purchasing more SME-friendly to tap into the growth potential provided by the new business. Europe 2020 strategy stated again how access to the single market 'must be improved' for SMEs. The measures outlined in the strategy included simplifying company law and adopting initiatives enabling entrepreneurs to restart after failed business.[552] The 2011 review of the 'Small Business Act' further emphasised the central role of small and medium-sized enterprises (SMEs) in the Union economy.[553] The Commission's 'Single Market Act' ofApril 2011 set the objective to reduce administrative burden and overall regulatory burden 'in particular for SMEs'.[554]

The establishment of the European Venture Capital Fund (EuVECA) in 2013 ensured new and growing businesses more accessible finance and expertise and knowledge, business contacts, brand equity and strategic advice.[555] The objective of the EuVECA is to

> [--]stimulate economic growth, contribute to the creation of jobs and capital mobilisation, foster the establishment and expansion of innovative undertakings, increase their investment in research and development and foster entrepreneurship, innovation and competitiveness [--].[556]

The Commission also proposed a directive concerning establishing and recognising single-member private limited liability companies to support SMEs. The objective of the proposal was to achieve higher cross-border participation of SMEs in the internal market by lowering the threshold to accessing European markets for single-member limited liability companies.[557] This proposal, however, was not accepted, and the directive on private single-member limited liability companies from 2009 remains in force with minor modifications made in 2013.[558]

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[549] See COM/2008/0394 final.

[550] Ibid.

[551] See SEC/2008/2193.

[552] COM/2010/2020 final, 3.1, [5].

[553] See COM/2011/0078 final.

[554] COM/2011/0206 final, 2.9, [4].

[555] See Reg. (EU) No 345/2013, Preambles, (1).

[556] Reg. (EU) No 345/2013, Preambles, (1).

[557] COM/2014/0212 final.

[558] See Directive 2009/102/EC.

In addition to supporting SMEs, the Union aims to create 'a favourable financial, administrative and legal environment' for social enterprises.[559] Social enterprises are enterprises with broader social, environmental and community objectives. Social enterprises use their profits to achieve their social objectives. According to the European Commission, social enterprises mainly operate in the following fields: (1) work integration, that is, training and integration of people with disabilities and unemployed people; (2) personal social services, that is, health, well-being and medical care; (3) local development of disadvantaged areas and (4) other fields including recycling, environmental protection, sports, arts, culture or historic preservation, science, research and innovation, consumer protection and amateur sports.[560] The support of social business is closely related to the promotion of socially sustainable business discussed further below.[561]

(c) Protection of Posted Workers

While general labour law saw neither harmonisation nor new legal initiatives, securing the rights and the protection of posted workers progressed. Posted workers are employees sent by their employer to temporarily carry out a service in another EU Member State. Free movement of workers is one of the principles of the economic constitution of the EU. Measures adopted aim to secure more efficient protection of posted workers, whether Europeans or third-country nationals[562], but mainly European nationals[563]. The protection of the rights of European posted workers is related to the objective of 'Promoting Solidarity in the Single Market', outlined in the Commission Communication 'Towards a Single Market Act – For a highly competitive social market economy'.[564]

The original Posted Working Directive established 'a core set of clearly defined terms and conditions of employment which are required to be complied with by the service provider in the Member State to which the posting takes place to ensure the minimum protection of the posted workers concerned'.[565] According to Directive

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[559] Social enterprises: https://ec.europa.eu/growth/sectors/social-economy/enterprises_en (Accessed on 14 August 2019).

[560] Social enterprises: http://ec.europa.eu/growth/sectors/social-economy/enterprises_en (Accessed on 14 August 2019).

[561] See below Ch. 8.2.4.

[562] See Dir. 2014/36/EU.

[563] See Dir. 2014/67/EU.

[564] COM/2010/0608 final, 2.2.

[565] Dir. 2014/67/EU, Preambles, [3]. See Dir. 96/71/EC.

2014/67/EU on the enforcement of the original posting of workers, 'the implementation and monitoring of the notion of posting should be improved'.[566] To improve the implementation and monitoring of Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System, the regulation was amended to ensure adequate supervision.

(d) Consumer Protection & Empowerment

On 26 April 2010, the Commission decided to set up an expert group on a Common Frame of Reference in the area of European contract law.[567] On 19 May 2010, the Commission presented a Digital Agenda, which stressed the potential of European contract law in completing a digital Single Market for consumers and businesses.[568] In July 2010, the European Commission presented a Green Paper on policy options for progress towards a 'European Contract Law for Consumers and Businesses'.[569] The objective was to set out an instrument of European Contract Law, which 'could help the EU meet its economic goals and recover from the economic crisis'.[570] The paper outlined measures to develop contract law to benefit small and medium-sized enterprises and consumers. The resulting Consumer Rights Directive entered into force in 2011.[571] It replaced the previous two directives originating from 1997 and 1985. The directive's objective was to help achieve a real business-to-consumer (B2C) internal market and strike a balance between a high level of consumer protection and the competitiveness of enterprises.[572] The Consumer Rights Directive highlighted consumer access to information and established rules for withdrawals from agreements.

Already before the Consumer Rights Directive entered into force, the Commission outlined additional plans to strengthen the deteriorating confidence of consumers. This confidence deteriorated 'as a result of new developments in technology, unsustainable patterns of consumption or social exclusion'.[573] Accordingly, in 2012 the European Commission presented 'A European Consumer

[566] Dir. 2014/67/EU, Preambles, [7].
[567] See 2010/233/EU.
[568] See COM/2010/0245 final.
[569] See COM/2010/0348 final.
[570] COM/2010/0348 final, 2, [4].
[571] Dir. 2011/83/EU.
[572] See e.g. COM/2012/0225 final.
[573] COM/2012/0225 final, 3.

Agenda - Boosting confidence and growth'.[574] This agenda outlines additional general and sector-related measures focusing on product safety, energy, access to information, supervision and dispute-solving.

In 2013 a directive on alternative dispute resolution for consumer disputes came into force.[575] This directive had objectives very similar to those of the Consumer Rights Directive. It pursued the proper functioning of the internal market by achieving a high level of consumer protection.[576] In addition, the aim was to resolve disputes in a more accessible, faster and cheaper manner than court-based dispute resolution.[577] This faster and more accessible way of resolving consumer disputes is the alternative dispute resolution (ADR). The 2013 directive harmonised practices concerning ADR among the Member States and between business sectors.[578]

In addition to external relations between businesses and between businesses and consumers, the Union adopted measures to influence the internal relations of corporations by providing a framework of corporate governance.

(e) Corporate Governance

Corporations are internally accountable to their owners and shareholders. The measures which protect the interests of passive shareholders and minority shareholders aim to foster this relationship.[579] The focus has been on strengthening long-term shareholder commitment and improving transparency.[580] These measures adopted to protect shareholder interests apply to all listed companies.[581] Measures adopted since 2014 are consistent with these objectives: The 2018 Commission Implementing Regulation (EU) 2018/1212 lays down minimum requirements regarding shareholder identification, the transmission of information and the facilitation of the exercise of shareholders rights. Also, in the recently established

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574 See COM/2012/0225 final.

575 Dir. 2013/11/EU, which amended Reg. (EC) No 2006/2004 and Dir. 2009/22/EC.

576 Ibid., Art. 1.

577 Ibid., Preambles, [4].

578 Ibid., Preambles, [5].

579 See COM/2011/0164 final; COM/2012/0740 final; and COM/2014/0213 final. See also Ilmonen 2016.

580 See e.g. Dir. 2013/36/EU (CRD IV), and Reg. No 575/2013 (CRR). Both have been amended since with Dir. (EU) 2019/878 (CRD V), and Reg. No 2019/876 (CRR I). In 2017, the Union amended the Shareholder Rights Directive 2007/36/EC to encourage more long-term engagement of shareholders. (See Dir. (EU) 2017/828.)

581 The measures described a regulating the internal relations of financial and banking institutions also fall under corporate governance, but they are specific to that particular sector.

EU Company Law, a company may be ordered by a decision of a court of law to be nullified. Nullity may be ordered on several grounds, including that the objects of the company are unlawful or contrary to public policy.[582] The final measure is closely connected to the promotion of a socially sustainable business.

7.2.5 Promoting Socially Sustainable Business

The crisis raised the issue of the overall influence of business in society. As stated in the Single Market Act of 2010, '[i]t is of paramount importance that European businesses demonstrate the utmost responsibility towards not only their employees and their shareholders but also towards society at large'[583]. The impact of business on society at large led to several measures adopted in the field of (a) corporate social responsibility, (b) production of services of general economic interests and public procurement, and (c) promotion of social business.

(a) A New Strategy for Corporate Social Responsibility

In 2011, the Commission presented a renewed EU strategy for corporate social responsibility.[584] In this strategy, the Commission redefined the concept of corporate social responsibility. Whereas the definition used earlier stated that corporate social responsibility is a 'concept whereby companies integrate social and environmental concerns in their business operations and their interactions with their stakeholders on a voluntary basis'[585], the definition now includes 'the responsibility of enterprises for their impact on society'.[586] This responsibility is manifest in the voluntarily adopted measures and respect for the applicable legislation and collective agreements between social partners.[587]

The Commission identified several essential factors in fostering more responsible corporate practices. These factors included the need to pay more attention to human rights and acknowledge the role of complementary regulation in creating an environment conducive to enterprises voluntarily meeting their social

[582] Dir. (EU) 2017/1132, Art 11(ii).
[583] COM/2010/0608, 2.4, [7].
[584] See COM/2011/0681 final.
[585] COM/2001/0366 final, [20].
[586] COM/2011/0681 final, 3.1, [1].
[587] Ibid.

responsibility.[588] The Commission refers to CSR as central to achieving multiple flagship initiatives adopted in Europe 2020 strategy, including the Integrated Industrial Policy for the Globalisation Era, the European Platform against Poverty and Social Exclusion, the Agenda for New Skills and Jobs, Youth on the Move, and the Single Market Act.[589] In addition, the flagship initiative on Innovation Union aims to enhance the capacity of enterprises to address societal challenges through innovation.[590]

In its 'renewed EU Strategy 2011−14 for Corporate Social Responsibility', the European Commission highlighted the importance of implementing the United Nations Guiding Principles on Business and Human Rights (UNGPs). As a result, in 2005 the position of the UN Secretary-General's Special Representative on Business and Human Rights was established. Professor John Ruggie, an expert in the field of human rights and international relations, was selected for the post. He drew guiding principles on human rights and corporations which were then accepted in 2008 by the United Nations Human Rights Council (UNHRC) as the UN 'Protect, Respect and Remedy' Framework.[591] The final United Nations Guiding Principles on Business and Human Rights were adopted on 16 June 2011.[592] The 31 principles established 'seek to provide an authoritative global standard for preventing and addressing the risk of adverse human rights impacts linked to business activity'[593] but are not compelling nor meant to be a basis for new international regulation for businesses.

While the UNGPs do not require new regulations to be issued, nor create binding legal responsibilities for business, in many cases, the European Union has gone beyond the call of duty. The EU has issued regulations encouraging or enforcing corporate responsibility locally and globally. The measures adopted tackle possible violations of fundamental and human rights and issues of general interests, especially tax fraud and corruption. The Country-by-Country Report Mechanism (CBCR) established in 2013 aims to enhance corporate transparency, especially in

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[588] Ibid, at 2, [16]–[17].

[589] Ibid., footnote 3. See COM/2010/0614 final; COM/2010/0758 final; COM/2010/0682 final; COM/2010/0477 final; COM/2011/0206 final

[590] See COM/2010/0546 final

[591] A/HRC/8/5

[592] HR/PUB/11/04

[593] Guiding Principles on Business and Human Rights: https://www.unglobalcompact.org/library/2 (Accessed on 6 September 2016).

the extractive and forest industries.[594] The Country-by-Country Report includes financial statements from each of the countries in which corporation operates. The objective of the CBCR is to make public all payments made by multinational companies to all states in which they operate. . The renewed directive addresses the importance of natural resources, tax collection and effective tax rate to the states. Additionally, it seeks to positively affect civil society participation, trust among stakeholders and domestic accountability of extractive sector activities by promoting company disclosure of social and environmental information. As the Commissioner for Internal Market and Services Michel Barnier has stated:

> With the new rules on country by country reporting, we have created a framework where businesses and governments must disclose revenues from natural resources. This framework will also contribute to the fight against tax fraud and corruption.[595]

In 2013, in the framework of CBCR, the Union adopted a CDR IV package concerning credit institutions.[596] Regulation concerns remuneration policies relevant to the risk-taking and stability of the financial sector and banks. Another CBCR regulation issued by the Union concerned multinational corporations.[597] These rules apply to public-interest entities, including listed companies, banks, insurance undertakings and other companies with more than 500 employees. In addition, the regulation requires them to disclose relevant, business-related information such as information on environmental and social matters. This information is vital from the perspective of the human rights of individuals under the influence of CEs, particularly CEs operating in the extractive and logging industry.[598] However, one of the primary goals of CBCR is to facilitate cross-border investment and enhance the transparency of capital flows to enforce tax rules.[599]

(b) Services with General Economic Interest & Public Procurement

As the European Union aims to curtail anti-competitive behaviour in market abuse and taxation, it simultaneously seems to have loosened its hold on the Member States

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[594] Dir. 2013/34/EU. See also Council Dir. (EU) 2016/881, which requires Multinational (MNE) Groups located in the EU or with operations in the EU, with total consolidated revenue equal or higher than € 750,000,000 to file country-by-country reports.

[595] MEMO/13/546, [1].

[596] See Dir. 2013/36/EU; Reg. (EU) No 585/2013.

[597] See Dir. 2013/34/EU.

[598] Ibid.

[599] See e.g. SEC/2011/1290 final; SEC/2011/1289 final.

when delivering public services. For example, in its communication on SGEIs, the Commission established how it aims to clarify the rules on when State funding of public services is regarded as State aid or not.[600]

The definition of SGEIs and the relevant regulation was modified on several occasions after 2008. In December 2011, the previously established 'Monti-Kroes Package' of July 2005 was replaced with a revised package of EU state aid rules for the assessment of public compensation for Services of General Economic Interest.[601] Commission Vice-President in charge of competition policy, Joaquín Almunia, stated that

> The new SGEI package provides Member States with a simpler, clearer and more flexible framework for supporting the delivery of high-quality public services to citizens which have become even more necessary in these crisis times. The Commission's duty, of course, is to ensure companies entrusted with services of general interest do not get overcompensated, which safeguards competing activity and jobs, and guarantees an efficient use of scarce public resources.[602]

The previous trend regarding SGEIs (and aprtly also SGIs) has been to increase competition in the production of these services. In 2011, however, the Commission seemed to adopt a more limited approach to promoting competition, requiring competition only when it has relevance to the internal market. This is reflected in the Commission proposal concerning public procurement:

> The proposal takes account of this by providing a specific regime for public contracts for these services, with a higher threshold of EUR 500 000 and imposing only the respect of basic principles of transparency and equal treatment. A quantitative analysis of the values of contracts for the relevant services awarded to economic operators from abroad has shown that contracts below this value have typically no cross-border interest.[603]

Instead of promoting competition, the clarification of rules focuses on the State and public authorities' capability to provide public services when and how deemed necessary.

> The overall objective of the reform of the State aid rules for SGEI is to boost the contribution that SGEI can make to the wider EU economic recovery. Member States need, in fact, to guarantee certain services at affordable conditions to the general population (e.g. hospitals, education, social services, but also communications, energy

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600 See COM/2011/0146 final.

601 See 2012/C 8/02; 2012/21/EU; 2012/C 8/03; Reg. (EU) No 360/2012. See Monti 2010.

602 IP/11/1571, [2].

603 COM/2011/0896 final, 5, [26].

> or transport). National, regional and local authorities are responsible and enjoy a large discretion in providing, commissioning and organising SGEI. At the same time, however, an efficient allocation of public resources for SGEI is key to ensuring the competitiveness of the EU and economic cohesion between the Member States. Efficient and high quality public services support and underpin growth and jobs across the EU. Social services, in particular, also help to mitigate the social impact of the crisis.[604]

According to the Commission, 'responsible business conduct is especially important when private sector operators provide public services'.[605] Accordingly, the new Public Procurement Directive gives administrators more freedom to use bidding criteria to promote other political objectives, such as high-level employment, social and regional cohesion and inclusion, environmental protection, controlling climate change and offering high-quality social services.[606] These objectives coincide with the objective of distributing benefits created by the market considered above. By supporting employment, public procurement can be used to distribute wealth. Authorities can also impose criteria concerning the standards of products and services and obligate producers to have a certificate for their products or services, particularly concerning their social and economic impact.

However, the statements concerning previous unlawful practices are particularly important:

> Public contracts should not be awarded to economic operators that have participated in a criminal organisation or have been found guilty of corruption, fraud to the detriment of the Union's financial interests, terrorist offences, money laundering or terrorist financing. The non-payment of taxes or social security contributions should also lead to mandatory exclusion at the level of the Union.[607]

> Contracting authorities should further be given the possibility to exclude economic operators which have proven unreliable, for instance because of violations of environmental or social obligations, including rules on accessibility for disabled persons or other forms of grave professional misconduct, such as violations of competition rules or of intellectual property rights.[608]

Article 18(2) of the Directive states how 'Member States shall take appropriate measures to ensure that in the performance of public contracts economic operators

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[604] COM/2011/0146 final, 4, [1].

[605] COM/2011/0681 final, 1.2.

[606] Dir. 2014/24/EU, Preambles, (36); Articles 20 & 70. See COM/2010/2020 final; COM/2011/0681 final; COM/2011/0896 final .

[607] Dir. 2014/24/EU, Preambles, (100).

[608] Ibid., (101).

comply with applicable obligations in the fields of environmental, social and labour law established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions listed in Annex X.' Annex X includes a list of key ILO Treaties.

The Public Procurement Directive also supports the participation of SMEs and social enterprises as per the Commissions' CSR –strategy and Commissions' Social Business Initiative.[609]

(c) Promotion of Social Business

In October 2011, the Commission published a Communication entitled 'The Social Business Initiative. Creating a favourable climate enterprises, key stakeholders in the social economy and innovation'.[610] The communication promoted the increased participation of SMEs and social enterprises in producing public services, especially in the production of services of general interests (SGIs) and services of general economic interests (SGEIs). These issues are closely related. Social Business Initiative includes a reference to the Commission Communication on reforming and adopting more varied EU rules concerning State aid applicable to Services of General Economic Interest.[611] The regulation adopted aims to ensure access to finance for social businesses by establishing the European Social Entrepreneurship Fund (EuSEF).[612]

7.3 Policy Analysis: Stick, Carrot or Sermon?

This chapter systematised the policy measures and regulations adopted in response to the challenges posed and perpetuated by the financial and economic crisis. The systematisation of policy measures reveals how the Union established new rules to safeguard the functioning of financial and banking institutions and protect consumers. In addition, the Union established norms on monitoring and supervision to secure rule-compliance to enforce tax compliance and protect posted workers. In the area of competition, the Union aimed toensure compliance through administrative and criminal sanctions.

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609 Dir. 2014/24/EU, Preambles, (2), (78). See COM/2011/0682 final, 2, [3]; 3.3.2.

610 See COM/2011/0682 final.

611 Ibid. See also COM/2011/0146 final.

612 See Reg. (EU) No 346/2013.

On the other hand, the Union utilises positive economic incentives to protect human rights and promote other social objectives. For example, the Union established a *framework regulation*[613] to provide competition-based economic incentives for businesses to act socially responsibly. The framework regulation enables consumers, shareholders, other businesses and public contracting authorities to make informed decisions. The implicit assumption is that when given the opportunity, consumers and shareholders make decisions that contribute to the economic, social and environmental sustainability of the economic system and support businesses with higher standards. The Union also provided financial support and financial opportunities for socially aware businesses.

he measures adopted can be analysed in the framework of policy instruments. The governance literature divides policy instruments into 'stick, carrot, and

Regulation: norms sanctions supervision	Banking regulations Supervision of banking & financial institutions	*Proper functioning & stability of the financial and banking sector*
	Financial transaction tax Tax avoidance Market abuse	Increase the perceives fairness of the markets & enforce competition → *Distribution of costs & benefits*
Framework regulation: Duty to publish information Consumer protection Protection of minority shareholders	Consumer Protection Directive Corporate Governance Country-by-Country Report Mechanism Accounting Directives Public Procurement Directive	Balancing market powers & lifting the corporate veil → Enable ethical and sustainable choices by consumers, shareholder, public authorities, *etc.* → *Competition-based economic incentives*
Direct economic support	European Social Fund European Union Programme for Social Change and Social Innovation Horizon 2020	Economic reward & compensation for contribution to general interests and social sustainability → *Criterion-based economic incentives*

Table 11. Regulatory and policy instruments utilised to achieve regulatory objectives.

[613] Framework regulations can be seen as a stricter form of metaregulation. See Gunningham 2010, 135; Coglianese & Mendelson 2010, 151 & 161–162.

sermon'.[614] Sticks are norms guiding the behaviour of actors, where sanctions pack up norms. Carrots are positive economic incentives. While 'carrots' often require a regulatory framework, the regulation itself does not restrict actors' decision-making but steers it by providing positive economic incentives. Sermon, or information, aims to influence decision-making without external negative or positive incentives using the actor's internal preferences. The following analyses whether the measures adopted employ norms and sanctions, positive economic incentives or information. (Table 11.)

a) Stick

Since the financial crisis, the amount of binding regulation governing the financial and banking sectors has increased significantly. The resolution mechanism allows declaring insolvency and liquidation of failing banks. The European Commission, the European Central Bank, and the Member States, through their representatives, are active participants in this process. The legislation also establishes sanctions to ensure rule compliance. The report of 25 February 2009 by the High-level Group of Financial Supervision in the EU, chaired by Jaques de Larosière, highlighted the necessity of sanctions and their effective enforcement, 'in order to preserve market integrity'.[615]

Taxation is another area of law where the Union has adopted supervision and sanctioning as policy instruments. Natural and legal persons may use the internal market to relocate their business and assets. While previously double taxation was considered a more relevant policy issue, the Union paid more attention to tax avoidance during the crisis. While freedom of movement and establishment is an essential principle in the Union, tax avoidance by artificial arrangements is prohibited.[616] As described above in Chapter 7.2.3, the Union has adopted regulatory measures to enforce the principles of good tax governance. On the other hand, Chapter 7.2.4 described how the Union has adopted measures to ensure compliance by enhancing both administrative and criminal sanctions for market abuse in competition law.

The issue of market abuse generally relates to the position of consumers, another area where the Union has adopted traditional regulation. In the renewed CSR Strategy, the European Commission noted how

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[614] See Bemelmans-Videc, Rist & Vedung 2017

[615] Dir. 2014/57/EU, Preambles, [3].

[616] See e.g. COM/2003/0317 final.

> [t]he economic crisis and its social consequences have to some extent damaged consumer confidence and levels of trust in business. They have focused public attention on the social and ethical performance of enterprises.[617]

In consumer markets, the new Consumer Rights Directive was presented in 2011 and entered into force in 2014.[618]

The regulation on the rights of third-nationality posted workers underlines ensuring decent working and living conditions for seasonal workers.[619] It enhanced the monitoring of the implementation of terms and conditions of employment of posted workers. The objective of the regulation is to strengthen enforcement by enhancing supervision. Again, the regulatory measures adopted do not directly influence employers' legal duties but aim to ensure efficient enforcement of pre-existing obligations.

b) Carrot

The use of economic incentives is visible in multiple measures adopted in the Union. Some of the measures provide direct financing or better business opportunities. Others establish a framework for corporate transparency, where the assumption is that socially responsible business gains a competitive advantage in the markets.

The so-called Social Investment Package established in 2013 is one example of direct financing.[620] This package includes guidelines for using the European Social Fund, outlining that the funds should be used to encourage private actors to participate in social investments. In its Communication on Social Investments, the Commission states how '[t]he challenges posed by changing demographics have been aggravated by the crisis, putting pressure on Member States' budgets at a time when efforts to meet the Europe 2020 strategy objectives need to be stepped up'. While highlighting the need to improve the efficiency and effectiveness of social policies, the Commission calls for private and third sector resources 'to complement public efforts'.[621]

Newly established financial instruments attract investors, and the Union's financial programmes support businesses classified as social businesses.[622] These

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[617] COM/2011/0681 final, 1.3, [2].

[618] Dir. 2011/83/EC.

[619] Dir. 2014/36/EU, Preambles, [7].

[620] See COM/2013/0083 final.

[621] COM/2013/0083 final, 1, [5].

[622] See e.g. COM/2011/0206 final.

support measures for social business include a proposition for 'a 90-million euro European financial instrument be set up to facilitate access to funding for start-up, development and expansion of social enterprises'. This expansion will be achieved 'by way of investment in solidarity investment funds, which provide own-capital and debt-financing instruments, under the European Union Programme for Social Change and Social Innovation'[623]. Other Community programmes support these instruments, such as the EU Research and Innovation Finding Programme Horizon 2020.[624]

In its communication on the 'Stronger Role of the Private Sector in Achieving Inclusive and Sustainable Growth in Developing Countries'[625], the European Commission outlined a new strategic framework. The objective of this framework was to ensure that private sector operations in developing countries have a positive impact on society, particularly on women, young people and the poor. The Commission requires that to receive additional monetary support, private enterprises need to demonstrate that their operations are compliant with environmental, social, and fiscal standards, including respect for human and indigenous rights, decent work, good corporate governance and sector-specific norms. Hence, direct financing is used to support social responsibility and social sustainability, locally and globally.

In other areas, regulatory measures enable financing of innovations and sustainable development to create incentives for private parties to invest in these policy-relevant areas.[626] The Commission has emphasised '[t]he need to promote market reward for responsible business conduct, including through investment policy and public procurement'. According to the Commission

> [t]rade unions and civil society organisations identify problems, bring pressure for improvement and can work constructively with enterprises to co-build solutions. Consumers and investors are in a position to enhance market reward for socially responsible companies through the consumption and investment decisions they take. The media can raise awareness of both the positive and negative impacts of enterprises. Public authorities and these other stakeholders should demonstrate social responsibility, including in their relations with enterprises.[627]

The United Nations Guiding Principles on Business and Human Rights (UNGPs), adopted on 16 June 2011, aimed to control corporate power in the area where human

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[623] COM/2011/0682 final, 3.1.2, [2].

[624] Ibid, at 3.2.2, [3].

[625] COM/2014/263 final.

[626] See e.g. COM/2010/0301 final; Reg. (EU) No 346/2013.

[627] COM/2011/0681 final, 3.4, [3].

rights do not create binding duties for corporate actors. Nevertheless, the European Union has implemented measures that seem to underline the core principles and objectives of the UNGPs. It has created legal obligations for corporations within specific sectors and with a certain volume of business to increase *transparency*.

Directive 2014/95/EU regarding disclosure of non-financial and diversity information by certain large undertakings and groups outlines how

> [a]s regards social and employee-related matters, the information provided in the statement may concern the actions taken to ensure gender equality, implementation of fundamental conventions of the International Labour Organisation, working conditions, social dialogue, respect for the right of workers to be informed and consulted, respect for trade union rights, health and safety at work and the dialogue with local communities, and/or the actions taken to ensure the protection and the development of those communities. With regard to human rights, anti-corruption and bribery, the non-financial statement could include information on the prevention of human rights abuses and/or on instruments in place to fight corruption and bribery.[628]

For example, the CBCR requires reports on income tax information to be available to the public on the company's website. Mandatory transparency creates incentives for companies to comply with standards or risk their reputation and the loss of possible business opportunities. In addition, a corporation with reporting duties may gain a competitive advantage by following norms where others fail to do so or by going above and beyond regulatory duties. In other areas, positive economic incentives are also provided for those willing to invest in achieving social objectives.

Regulation creates a framework where competition is used as an instrument to encourage corporations to adopt socially responsible policies. One crucial area of the competitive market is the market for public procurements. Public expenditures concerning goods, services and buildings constitute about 18% of the European Union's GNP. The European Commission has described how '[g]iven the volume of purchases; public procurement can be used as a powerful lever for achieving a Single Market fostering smart, sustainable and inclusive growth'.[629]

When proposing a new directive for public procurement, the Commission referred to challenges posed by the contemporary economic environment. It announced that the existing public procurement legislation needs to be revised and modernised to better deal with the evolving political, social, and economic

[628] Dir. 2014/95/EU, Preamble, [7].

[629] COM/2011/0896 final, 1, [8]. See also COM/2012/007 final.

context.[630] By utilising the new public procurement directive, national and local authorities can better consider the effects of the public production or services on the local environment, employment and the economy. As a result, authorities may impose higher standards for products and services or additional requirements concerning employee or customer participation, social cohesion, or environmental protection. The Single Market Act of 2011 outlining measures to boost growth and strengthen confidence described how:

> Revised and modernised public procurement legislative framework, with a view to underpinning a balanced policy which fosters demand for environmentally sustainable, socially responsible and innovative goods, services and works. This revision should also result in simpler and more flexible procurement procedures for contracting authorities and provide easier access for companies, especially SMEs.[631]

While requirements to employ long-term unemployed, young or disabled people could have been used as tendering criteria in the framework of the 2004 directive, the renewing of the directive elucidates the situation and promotes the use of such standards.[632] Certificates may be used as guidelines, as long as there is no discrimination between similar certificates .

The 2014 directive seems to explicitly encourage the use of public procurements to pursue social goals. It describes how administrators might use bidding criteria to promote other political objectives, such as a high level of employment, social and regional cohesion and inclusion, environmental protection, controlling climate change and offering high-quality social services. Additionally, administrators may reject such bidders who have a history of violating national labour, tax or environmental regulation. Indeed, public administrators are *obliged* to disqualify offers that are likely to violate the European Union's social, labour or environmental regulation. Finally, the directive provides strong market-based incentives for businesses to comply with the regulation not to lose their possible share of public purchases.

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[630] See COM/2011/0896 final, 5, [19].

[631] COM/2011/0206 final, 2.12, [1]. See also the EU flagship initiatives 'Innovation Union' (COM/2010/0546 final), and 'An Integrated Industrial Policy for the Globalisation Era' (COM/2010/0614 final).

[632] See COM/2011/0015 final; COM/2011/0896 final; Dir. 2014/24/EU.

c) Sermon

Market-based economic incentives only work in the desired direction if information about business conduct is available, which is why several regulatory reforms and other measures aim at lifting or piercing the 'corporate veil'.[633] The purpose of establishing the Country-by-Country-Review Mechanism is to allow local community members, trade unions, NGOs and journalists to access relevant information. Moreover, the Commission Staff Working Document evaluating its impact has stated that by making non-financial information publicly available, it 'could be used by civil society organisations and local communities to assess the impact and risks related to the operations of a company'.[634] The impact of information on consumers' decision-making, non-governmental organisations, other businesses, officials and other interest groups is an incentive for corporations to take measures that support general policy objectives and the common good.[635]

Ultimately, the mechanism of action is information. Regulation enhancing transparency provides information for consumers, shareholders, procurement authorities and other businesses interested in the social impact of business. Regulation enhancing the market position of consumers and the position of minority shareholders balances their powers against businesses and enhances their impact on the behaviour of the business.

In addition to formally empowering consumers, shareholders and other market actors, positive measures are taken to increase their actual ability to protect their rights. The Commission has recognised how important it is to pay attention to both 'overload on information' and 'knowledge deficit', as the Commission has noted.[636] The Commission has therefore outlined different measures to increase consumers' awareness of their rights, help them to find relevant information and tackle information overload by producing guides and codes, such as the YouEurope portal e-YouGuide, and Code on EU online rights.[637]

However, it is not expected that consumers are already in the mindset of making more sustainable decisions and that it is just their access to information about

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[633] See van Calster 2014.

[634] SWD/2013/0128 final, 5.3.

[635] COM/2011/0681 final, 3.3, [2]. According to Giovanni Comandé (2014) in the shadow of this consumer-citizenship, a true European political citizenship is developing.

[636] COM/2012/0225 final, 3.3.

[637] See SEC/2011/469 final.

services and products which is lacking. Consumers also need to be provided with information about sustainability:

> Consumer attention to CSR-related issues has grown in recent years, but significant barriers remain, such as insufficient awareness, the need sometimes to pay a price premium, and lack of easy access to the information necessary for making informed choices. Some enterprises play a pioneering role in helping consumers to make more sustainable choices. The revision of the Sustainable Consumption and Production Action Plan may provide an opportunity to identify new measures to facilitate more responsible consumption.[638]

Also, as described by the Commission in the European Consumer Agenda:

> Awareness-raising campaigns will be organised with Member States and stakeholders on key consumer issues. It is also essential that national authorities and private-sector organisations enhance education offer for consumers throughout the EU from a young age.[639]

The Union established clear policy preferences of what is expected of consumers to support economic, environmental, and social sustainability. This constitutes indirect intervention on the market.

7.4 Summary

To summarise the regulatory measures adopted since the onset of the financial and economic crisis, the crisis had led to a revelation that the pre-crisis regulatory framework was not sufficient to guarantee the proper functioning of the markets. Therefore, to tackle issues endangering the European economic system's economic and social sustainability, the European Union adopted various policy measures.

As Chapter 7.2.2 described, several new rules were proposed and adopted in the financial and banking sector to better regulate, supervise and govern the sector's activities. The Union enforced rules on bank capital and liquidity as well as policy requirements for enumeration and financial liabilities. The Union prohibited big banks from engaging in risky activities in order to safeguard banking services. The European Supervisory Authority was established to oversee and supervise the banking and financial sector.

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[638] COM/2011/681 final, 4.4.1.

[639] COM/2012/0225 final, 4.2, [4].

However, the damage was already done: The level of unemployment rose across Europe. Simultaneously governments cut back their spending on social and health services while unemployment rose. The financial and economic crisis challenges the principles of the Union on a fundamental level. It had created high societal costs. In 2010, the European Commission stated how it aimed to 'regain confidence, together, in our social market economy model, by placing Europeans at the heart of the market once again'.[640]

Chapter 7.2.3 described measures taken to share the costs of the crisis, including establishing a resolution fund for banks to tackle possible future crises and establish more robust liability. Some Member States adopted the financial transaction tax to cover the costs of the current and possible future crisis. Tax evasion was combatted to ensure everyone contributes according to their carrying capacity. The SMEs, consumers and minority shareholders were given a more decisive say in the market environment. However, the measures adopted often concerned the rights of other parties.

Nevertheless, the final objectives of regulation closely related to the general objective of the competitive market and sustainable economic growth. The financial and banking sector regulation aimed to correct prior regulatory failures, including the overall under-regulation of the financial sector and the over-reliance on self-regulation.[641] Regulation sought to ensure that the financial and banking sector fulfils its commercial purpose, providing access to financing[642], which is a precondition for sustainable economic growth.[643] The regulation concerning credit rating agencies pursued the same objective by reducing reliance on credit rating institutions and establishing general rules of conduct.[644]

Similarly, the European Securities and Market Authority was given the authority to ensure 'the correct and full application of Union law'[645]. This is seen as

> [--] a core prerequisite for the integrity, transparency, efficiency, and orderly functioning of financial markets, the stability of the financial system, and for neutral conditions of competition for financial market participants in the Union.[646]

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[640] COM/2010/0608 final, Introduction, [13].

[641] See Reg. (EU) No 575/2013, Preambles, [90]. On the Programme for the Liberalization of Capital Movements in the Community, see COM/1986/0292 final.

[642] See e.g. Reg. (EU) No 648/2012.

[643] See e.g. COM/2011/0206 final; COM/2010/0301; Reg. (EU) No 345/2013; COM/2010/0608 final. See also COM/2008/0800 final; Council Reg. (EU) No 1024/2013; COM/2010/0301 final.

[644] COM/2011/0746 final, 1, [1]. See also COM/2011/0747 final; COM/2012/0367 final.

[645] Reg. (EU) No 1095/2010, Preliminaries, [27].

[646] Ibid.

Similar objectives were pursued with the establishment of criminal sanctions for market abuse.[647] As described by the European Commission, 'the European project relies on market forces, which ensure that citizens have access to the widest possible choice of goods and services, at the lowest price'.[648] However, in several other areas, more indirect and discreet measures were adopted.

Sustainable economic growth in terms of environmental and social sustainability was addressed in the course of the crisis. Nevertheless, as Chapters 7.2.5 and 7.3 recognised, social objectives were primarily pursued by establishing framework regulation. The regulation adopted addresses challenges such as 'the issue of misleading marketing related to the environmental impacts of products', *i.e.* 'greenwashing'.[649] The renewed public procurement directive was another means to respond to social and environmental challenges.[650] Framework regulation created economic incentives for businesses to respond to societal needs, including the demand for more ethical business. Although consumers' decision-making reflects their individual preferences, this decision-making was framed with the information provided by the EU and its Member States aiming to educate consumers to consider sustainability.

The objectives of the measures adopted during the crisis period emphasised the protection of previous achievements of the Union, particularly the level of market integration attained, balanced economic growth and competition. The challenging economic situation raised concerns that the Member States would adopt protectionist measures. However, by taking forceful actions on the supranational level to protect national interests, the Union protected the level of market integration achieved and ensured the continuance of the internal market project.

The Commission Action Plan to strengthen the fight against tax fraud and tax evasion, for example, evaluated how

> [t]aking into account the freedoms awarded to them when operating in the internal market, businesses may structure arrangements with such jurisdictions via the Member State with the weakest response. As a result, the overall protection of Member State's tax revenues tends to be only as effective as the weakest response of any one Member State. This does not only erode Member States' tax bases but also endangers fair competitive conditions for business and, ultimately, distorts the operation of the internal market.[651]

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[647] Dir. 2014/57/EU.

[648] COM/2010/0608 final.

[649] COM/2011/0681 final, 4.2, [3].

[650] See e.g. COM/2011/0015 final, 4, [1].

[651] COM/2012/0722 final, 3.7, [2].

It becomes evident that various mechanisms were designed and put in place to respond to the societal and legitimacy issues raised by the crisis. Generally, what took place was an attempt to create a more efficient regulatory environment for the market.[652] As Chapter 7.3 described, the objective of framework regulation was to strengthen the reflexivity of markets, *i.e.* how the qualities and prices of products and services offered truly reflect demand. An important mechanism here was 'access to information'. However, access to information was recognised to require framework regulation: The market itself did not provide sufficient incentives for transparency. The second objective seemed to be to increase the responsiveness of markets to various societal issues, such as social or environmental challenges. The latter utilised information in combination with the economic interests of business. It contributed to the sustainability of the European market model and the continuity and further advancement of the European internal market.

In all cases, the objective was to support the proper functioning of the market. The measures adopted in response to the financial and economic crisis did not reflect a paradigmatic change in the public management and legal governance exercised by the Union. Instead of direct intervention, the Union preferred economic incentives in steering the market in a socially acceptable direction. In addition to correcting the under-regulation of the financial and banking sector, measures adopted enhanced the regulatory framework in which the market operates. As a result, they enhanced the ability of the market to recognise and respond to social issues.

These pursuits influence the legal powers and legal relations of corporate entities. The following chapter aims to analyse the impact of the crisis measures on corporate legal powers and legal relations.

[652] The measures respond to the criticism presented by Olivier de Schutter in 2008. De Schutter argued that a stronger regulatory environment is required for the promotion of objectives, such as socially and environmentally sustainable economic development. He raised the possibility that regulation might be about creating a framework rather than directly intervening in market-transaction. See De Schutter 2008.

8 IMPACT OF CRISIS MEASURES ON CORPORATE ENTITIES

This chapter analyses the impact of the crisis on the legal powers and legal relations of corporate entities in the European Union. Chapter 8.2 provides an overview of policy measures relevant for corporations and studies the impact of those measures on the legal powers and legal relations of corporate entities. Chapter 8.3 then analyses how the measures adopted reflect the legal personhood and general principles of legal governance of corporate entities formulated in Chapters 5.4 and 6.4. The key outcomes of the analysis are: (1) that the Union objectives are strongly present in all the measures adopted; (2) that the measures reflect the social role of corporations to do business; and (3) that the evaluation of the efficiency of measures is key to determining legal powers and legal relations.

8.1 Introduction

As Viktor J. Vanberg described, the European Union established the 'rules of the market game'.[653] These 'market rules' establish the legal powers for 'market players', such as corporate entities.[654] Within these rules, the 'market players' make their choices.[655] The European Union made these rules to increase the prosperity of Europeans. These rules have provided corporations with unprecedented freedoms in the European Economic Area and rights protected by Union law. The objective has been to remove limits to allow businesses to choose what services and products they provide, where, and whom they provide them. The rules of the game have benefitted businesses and the expectation is that through market mechanisms (or market-like mechanisms), the business will benefit consumers. However, the financial and economic crisis brought the rules of the game under scrutiny.

The crisis that began in the financial sector had a significant general influence on the economy, creating economic costs in many ways. Firstly, because the failure of the banking institutions could have potentially resulted in the collapse of the entire

653 Vanberg 2007, 199.

654 Ibid.

655 Ibid.

economic and monetary system, the financial sector was supported with significant public funds. The bailouts were of the order of € 5 058.9 billion, provided between October 2008 and October 2012.[656] Secondly, unemployment increased as the financial crisis escalated into an economic crisis. Increased unemployment and the need to stimulate the economy to prevent further decline created pressure to increase public expenditure. The public resources, however, were scarce. The economic downturn decreased tax income and other sources of public revenue.

As employees, entrepreneurs and taxpayers, the ordinary consumers had to pay the bill. Simultaneously, many corporate entities and their shareholders used the liberties of free trade, especially in the European internal market, to avoid the social costs through cross-border reorganisation. While governments were hard pressed to provide economic support for unemployed citizens and small entrepreneurs and keep the economy going, many companies resorted to large-scale layoffs to protect their profitability. While layoffs are individual tragedies, on a larger scale, they made economic recovery more difficult and placed a greater burden on the States. Governments needed to use their limited resources in the manner that stimulated the economy the most. Sometimes stimulation happened at the expense of social support and services required by an increasing number of persons, whether unemployed, sick or pensioners.[657] Furthermore, what seemed to make matters worse was that as the crisis was paid for with public funds raised mainly from tax revenues, corporate tax evasion attracted attentioni..

During the financial and economic crisis, the use and misuse of corporate liberties and rights came under political scrutiny. In 2011, László Andor, the EU Commissioner responsible for employment, social affairs and inclusion, stated how '[v]alues like solidarity, sustainability, inclusiveness and integrity are not always upheld by business and I believe our economies have suffered as a result'.[658]

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[656] SWD/2012/443 final, 3.1.2, [3].

[657] In debt crisis, some MSs, such as Italy, Portugal and Spain, and Greece were subjected to Stability Support Programmes (SSPs), according to which they were required to enforce wage cuts, remove automatic salary increases, remove or lower various pension benefits and reduce health care costs, including the costs of medicines. While Social Impact Assessments were conducted, and the programmes were considered by the Commission Staff to be consistent with the obligations of human and fundamental rights of the Member States. (Decision 2011/734/EU. See also COM/2012/0739 final.) A more critical approach was, however, adopted by the Independent Expert on the effects of foreign debt and human rights of the UN Human Rights Council, Mr. Juan Pablo Bohoslavsky. Boholasky considered in his report that Greeks had been deprived of their fundamental social and economic rights. (See A/HRC/34/57/Add.1; A/HRC/31/60/Add.2; Greek crisis: http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16032&LangID=E#sthash.0o49dnC7.dupf (Accessed on 20 August 2017). See also A/HRC/28/59.)

[658] IP/11/1238, [7].

However, legally corporations are entitled to layoffs. Also, the EU legal system has inbuilt legal ways to minimise tax burden. Corporations are supposed to create efficacy by minimising costs and maximising profits. The rules established aim to support these objectives. However, the EU had also other objectives, such as solidarity, which it aimed to incorporate to the crisis measures.

Chapter 8.2 studies the legislative acts adopted by the EU in response to the financial and economic crisis from a corporate perspective. It aims to answer how the crisis measures influenced the legal powers and legal relations of corporate entities. Chapter 8.2 will take the policy measures adopted in response to the financial and economic crisis and analyse them in four parts: Measures taken (1) to respond to the causes of the crisis, (2) to share the costs of the crisis, (3) to distribute benefits created by the market and (4) to promote sustainable business. Each part consists of three sections: (a) an overview, (b) an analysis of the impact on legal powers and (c) an analysis of the impact on legal relations.

The first section provides an overview of the policy measures described in Chapter 7.2 but focuses on the corporate perspective. The second section then analyses the impact of the crisis measures focusing on the legal powers of corporate entities. This section utilises the analysis from Chapters 4 and 5, which categorised the legal powers of private law entities recognised or established by the EU and identified the legal powers enjoyed by corporate entities.[659] The third section of each part then analyses the impact of the crisis measures on the legal relations of corporations that are correlatives of corporate legal powers. The objective is to ascertain the impact of the crisis measures on the legal relations of corporate legal entities, including the associated natural entities, and the possible impact on the level of autonomy of corporations as legal entities from the associated natural entities and the State[660].

Chapter 8.3 will then consider how the measures adopted by the EU reflect the general principles of legal governance of CEs, formulated in Chapter 6.4. Finally, it will consider the fifth research question: How do the measures adopted reflect the legal personhood and general principles of legal governance of corporate entities? The aim is to provide depth for the analysis, increase the understanding of the legal

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[659] See above Ch. 2.2.2 on the nature of legal powers according to the Hohfeldian typology reviewed. Chapter 4.4.4 argued that (a) internal market liberties are privileges (*i.e.* particular liberties), (b) internal market rights are particular rights, (c) fundamental market liberties are general liberties, (d) fundamental market rights are general rights, (e) solidarity market rights are particular rights, (f) fundamental non-market liberties are general liberties and (g) fundamental non-market rights are general rights.

[660] See above Ch. 2.1.3 on the theory of corporate legal personhood and level of autonomy.

governance of corporate entities, and provide some more generalisable observations,which will then be taken under closer examination in Chapter 9.

8.2 Corporate Perspective on Policy Measures

8.2.1 Corporate Entities & Responses to the Causes of the Crisis

(a) Overview

The measures adopted to ensure the proper functioning of the financial and banking sector resulted in regulation directly intervening in the operations of commercial banks and financial institutions. The European Supervisory Authority was provided with significant competencies to supervise and intervene with bank operations, insurance and pension institutions and other financial institutions. Supervision has an essential role in ensuring the proper functioning of the financial and banking sector. The competence of the European Central Bank in the framework of the Single Supervisory Mechanism (SMM) is to review the assets of the banks and conduct stress tests.

In the case of the possible failure of a banking institution, the ECB may directly intervene in the banks' operations through the Single Resolution Mechanism (SMR). The Single Resolution Mechanism (SRM) grants authorities the power to intervene in the operations of the financial institutions in case of possible failure.[661] As described by the European Commission:

> Accordingly, an effective policy framework is needed to manage bank failures in an orderly way and to avoid contagion to other institutions. The aim of such a policy framework would be to equip the relevant authorities with common and effective tools and powers to address banking crises pre-emptively, safeguarding financial stability and minimising taxpayers' exposure to losses.[662]

Chapter 7.2.2 described the Asset Quality Review (AQR), which has three main goals: (1) Transparency through enhancing the quality of information available concerning the condition of banks; (2) repair, that is identifying and implementing necessary corrective actions, if and where needed and (3) confidence building,

[661] See e.g. Dir. 2014/59/EU; Reg. (EU) No 1093/2010; Reg. (EU) No 648/2012.

[662] COM/2012/0280 final, 3. [3].

namely assuring all stakeholders that banks are fundamentally sound and trustworthy.[663] Chapter 7.2.2 also described how excessive risk-taking in the financial and banking sector was curbed with remuneration policies.[664]

The financial crisis resulted from unsustainable practices in the financial and banking institutions, including excessive risk-taking. The objective of these measures was to regulate the financial and banking sector so that practices contributing to the financial crisis of 2008 would not continue.

(b) Impact on Legal Powers

This section studies how the measures taken to respond to the causes of the crisis impact corporate legal powers.

Firstly, measures taken to address the causes of the crisis changed the regulatory environment for businesses operating in the banking and financial sector. As Chapter 7.2.2 described, the European Union issued rules regulating the level of capital and liquidity held by banks and the operations of financial institutions when exchanging derivatives and securities. These measures constitute a *de jure* negative intervention in the freedom to conduct business enshrined in Article 16 of the Charter of Fundamental Rights.

The institutional competencies of the European System of Financial Supervisors (ESFS) to supervise the financial sector and the ECB to perform Asset Quality Review on banks means that these authorities have access to information. The supervision narrows *de jure* the sphere of banking and commercial secrets protected under the right to intellectual property (Article 17 CFR). The objective of reviews is to increase stability but also transparency. While the details of banking secrets are not public, the results of the asset reviews and stress tests are. This influences the sphere of banking and commercial secrets compared to the *status quo ante*. Intervention in banking secrets also affected the legal powers of their customers, including the associated natural persons who enjoy the fundamental non-market right to privacy.

According to the Bank Recovery and Resolution Directive (2013/C 216/01), banks and large investment firms needed to provide resolution funds to finance the restructuring of failing banks, which constitutes a *de jure* intervention in the freedom of business and property rights. Under the Single Resolution Mechanism (SRM), all

[663] See e.g. European Central Bank 2013.

[664] See above Ch. 7.2.2. See Dir. (EU) 2017/828; 2014/208/EU.

its operations come under scrutiny from public authorities if a bank fails.[665] Therefore, the restructuring process does mean significant *de jure* intervention in all aspects of autonomy for the banking company.

Measures responding to the causes of the crisis and sharing the costs of possible future crises also influences how CEs operating in the financial and banking sector may exercise their freedom of contract in internal relations. The regulation of remuneration policies aims to eliminate policies encouraging excessive risk-taking in the management of financial and banking institutions. While the intervention in contractual freedom is not direct because it does not create a legal duty to follow the established remuneration policies, it *de facto* limits autonomy. The duty to explain why the recommended policies are not followed limits contractual freedom: It implies that practices lacking sufficient justification may need to be changed by order of the authorities.[666] Again, the measures adopted also impact the legal powers of the associated legal and natural persons, including shareholders, junior capital holders, employees, customers and their legal relations with banking and financial companies.

The measures adopted to address the causes of the crisis influence the enjoyment of fundamental market liberties and rights as general liberties and rights. All market actors enjoy these liberties and rights, and the impact of measures is not limited to corporate entities but potentially affects all legal entities acting in the financial and

(1) Measures taken to respond to the causes of the crisis

(a) Overview	**(b) Impact on Legal Powers**	
Enhancing supervision in the financial and banking sector; Prevention & punishment for market abuse; Regulation of renumeration policies; Protection of depositors; Regulating the exhangce of derivatives and securities *etc.*	Freedom of business (*de jure*) ↓ Property rights (*de jure*) ↓ Contractual freedom (*de facto)* ↓	Fundamental market liberties and rights as *general liberties and rights* → Influences all legal entities acting in the financial and banking sector

Table 12. Impact of measures taken to address the causes of the crisis on corporate legal powers.

[665] Ibid.

[666] See above Ch. 7.2.2; Council Dir. 2013/23/EU, Art. 20

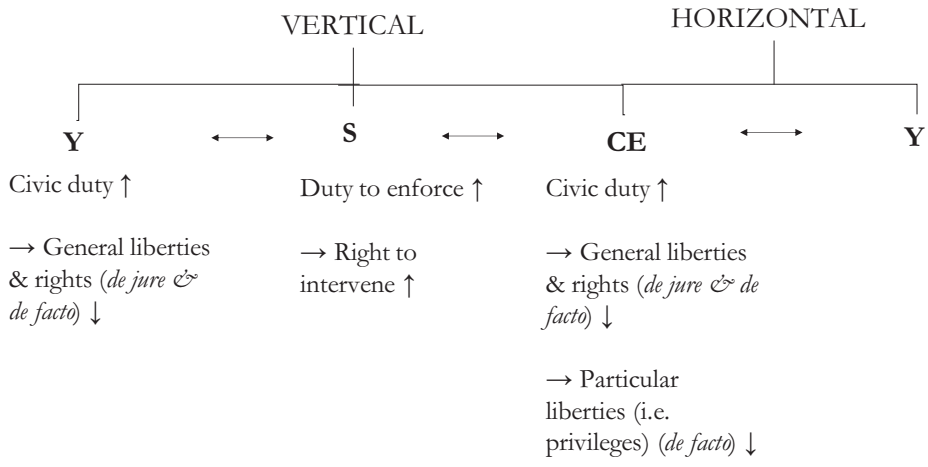
banking sectors. (Table 12.) The impact is *negative* for all private law entities, including corporate entities.

(c) Impact on Legal Relations

As the impact of the regulatory measures adopted in response to the causes of the crisis influenced equally and negatively the legal powers of all actors in the financial and banking sector, the influence of these measures on legal relations was primarily vertical. They increased the legal duties for PLEs acting in the financial and banking sector in their vertical relation with public power, generally referred to as the State (S). As the legal duties of both corporations (CE) and natural persons (Y) increased, the measures do not primarily affect the balance of powers in horizontal legal and contractual relations.

The measures adopted decreases the level of corporate autonomy from the State. This observation can be applied to *all private law entities* acting in the financial and banking sector, including ordinary depositors. By limiting the autonomy of these actors, the State established *civic duties* with measures that lack reciprocity. They do not directly benefit the obligated parties but serve public interests and public policies. (Figure 13.)

Figure 13. Impact of measures taken to respond to the causes of the crisis on corporate legal relation.



As Chapter 2.1.3 described, corporations as legal entities may hold a different level of autonomy from the State or the associated natural persons. The model of corporate legal personhood reviewed can be used to distinguish between different corporate forms and study changes in corporate legal powers. Furthermore, the concept of autonomy can be used to illustrate the impact of responses to the crisis measures on corporations as legal persons: The establishment of civic duties reduces their autonomy from the State in comparison to *status quo ante*.[667]

8.2.2 Corporate Entities & Sharing the Costs of the Crisis

(a) Overview

The financial and economic crisis created 'a heavy economic burden to be borne by today's taxpayers and future generations'[668]. While the Single Resolution Mechanism aims to spread the costs of possible future banking failures, the costs of the crisis at hand were also there to be paid. However, aggressive tax planning and tax avoidance practised by individuals and corporations surfaced during the crisis. Corporations are a potentially significant source of tax revenue for States, but aggressive tax planning significantly reduces this revenue. For example, between 2009 and 2011, Amazon paid 'little or no' corporate tax in the United Kingdom, although its sales were over £7.6 billion. Corporations practice tax planning with the aid of countries.[669] For example, sales made by *Amazon UK* were diverted through the Luxemburg-based company *Amazon EU Sàrl*, which is not subject to corporate taxation in Luxemburg due to a tax ruling. As described in the press release concerning the Commission investigation on the tax ruling, 'most European profits of Amazon are recorded in Luxembourg but are not taxed in Luxembourg.'[670]

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[667] This, of course, can be applied to all natural legal persons as private law entities. Natural persons with human dignity and inviolable liberties and rights have civic duties stemming from general interests that limit their autonomy as natural legal persons. The concept of level of autonomy can be used to study natural entities as legal persons with self-value as well. However, the focus of this study is on corporations considered as purely instrumental entities whose legal powers and legal duties are determined solely by statutory legislation. (See above Ch. 2.2.2.) The instrumental nature that differentiates corporate entities from natural entities becomes more apparent when studying the impact of measures taken to distribute the benefits created by the market and promoting socially sustainable business. (See below Chs. 8.2.3 & 8.2.4.)

[668] COM/2010/0254 final, 1., [1].

[669] These countries are referred to as *tax havens*.

[670] IP/14/1105; LDM_BRI(2013)130574_REV1_EN.

In 2010, the Commission discussed 'how burdens might be fairly shared'.[671] As Chapter 7.2.3 described, some of the measures adopted focused on establishing financial liabilities for financial and banking institutions. With measures proposed to tackle issues related to under-taxation of the financial sector, the Commission emphasised the responsibility of the financial sector of the economic crisis:

> [--] the recent global economic and financial crisis had a serious impact on our economies and the public finances. The financial sector has played a major role in causing the economic crisis whilst governments and European citizens at large have borne the cost. There is a strong consensus within Europe and internationally that the financial sector should contribute more fairly given the costs of dealing with the crisis and the current under-taxation of the sector. [672]

The measures adopted included the establishment of Financial Transaction Tax and the Single Resolution Fund. Financial Transaction Tax (FTT) was introduced in 11 Member States through enhanced cooperation pursued to ensure that the financial sector carries its share of the costs. This is a new form of taxation recognised by the Union; it taxes financial transactions between financial institutions. The Single Resolution Fund was established because it was considered that the financial institutions should carry the bailout costs. The regulation issued aimed to ensure that financial institutions as autonomous legal entities and the associated members, such as shareholders, capital holders and creditors, would share the costs of possible future crises. Simultaneously, this would increase their interest in the proper conduct of the institutions.

> [--] by removing the implicit certainty of a publicly-funded bail out for institutions, the option of resolution should encourage uninsured creditors to better assess the risk associated with their investments.[673]

In addition to the financial and banking sector, attention was paid to the burden-sharing of business generally. As Chapter 7.2.3 described, measures were adopted to combat the seemingly unfair division of tax burden. These measures include (a) the examination of tax rulings, (b) regulation improving the existing mechanisms for exchange of information between tax authorities, and (c) measures taken to tackle the avoidance of Value Added Tax (VAT). Commission Vice President in charge of competition policy *Joaquín Almunia* stated in 2014 how '[i]n the current context of

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[671] COM/2010/0254 final, 4.3, [7].

[672] COM/2013/071 final, 1.1, [1].

[673] COM/2012/0280 final, 3., [8].

tight public budgets, it is particularly important that large multinationals pay their fair share of taxes.'[674]

In the 2012 Action Plan to strengthen the fight against tax fraud and tax evasion, the European Commission stated how through 'paying taxes businesses can have an important positive impact on the rest of society'. However, Commission also highlighted how '[c]urrently, some taxpayers may use complex, sometimes artificial, arrangements which have the effect of relocating their tax base'. Commission considered 'that there is a need to ensure that the burden of taxation is shared fairly in line with the choices made by individual governments'.[675] In addition to artificial arrangements, the Commission undertook to study tax rulings between some Member States and various multinational enterprises, including the tax ruling between *Apple* and Ireland, *Starbucks* and the Netherlands, and *Amazon* and Luxembourg.[676]

(b) Impact on Legal Powers

The study of tax rulings does not constitute a new limitation on the principle of free movement *per se,* but rather more enhanced enforcement of the pre-existing legal duties of CEs to pay their 'fair share'. Nevertheless, the policy change is *de facto* increasing the sanctioning of the abuse of freedom of movement for tax evasion, narrowing the field of liberty CEs enjoy.

In addition to studying individual tax rulings to enforce the existing legal duty to pay taxes efficiently, the Union issued a new regulation.[677] The Council Directive on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States recognised that while the objective of the directive was to avoid double-taxation, it 'shall not preclude the application of domestic or agreement-based provisions required for the prevention of fraud or abuse'.[678] On 12 June 2013, the Commission proposed extensions to the automatic exchange of information between tax administrations aiming to better enforce the prevention of fraud and abuse.[679] The automatic exchange of information targets

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[674] IP/14/663, [2]. In essence, the question is also about the Member States practising sustainable and fair national economic policies, and their economic duties.

[675] COM/2012/0722 final, 8., [1].

[676] See above Ch. 7.2.3.

[677] Ibid.

[678] Article 1(2) Dir. 2011/96/EU.

[679] See COM/2013/0348 final; Council Dir. (EU) 2015/121, [5], [9].

financial products and removes the possibility of national authorities invoking banking security.[680] Also, the regulation issued by the EU tackles the issue of artificial arrangements put into place for the primary purpose of obtaining a tax advantage. This regulation influenced the relations between parent companies and their subsidiaries in various Member States, established as *per* freedom of establishment.[681] The Council Directive on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States recognised that while the objective of the directive is to avoid double-taxation, it 'shall not preclude the application of domestic or agreement-based provisions required for the prevention of fraud or abuse'.[682]

These new enforcement rules aim to ensure that the duty to pay taxes is fairly realised. The regulation establishes more substantial supervision and enforcement rules. These rules create obligations for the Member States. They do not create new duties for corporations nor do they limit their freedom of establishment *de jure*. However, they influence the scope of freedom of the establishment enjoyed by CEs *de facto* by stricter interpretation and enforcement of pre-existing legal duties. They impact freedom of business, freedom of contract, property rights, intellectual property rights and free movement of capital through more efficient enforcement of pre-existing legal duties. Increasing supervision with a lower tolerance for misuse constitutes a *de facto* negative intervention in the internal market liberties enjoyed by for-profit corporate entities with subsidiaries.

As Chapter 5.4.2 recognised, corporate entities enjoy the freedom of establishment (Article 50 TFEU). The freedom of establishment has meant the option to choose the country of the head office and to establish subsidiaries in other Member States. Corporate entities have used this option for tax planning. By selecting a country for the head office, in combination with possible tax rulings, corporate entities have been able to 'tender' between tax regimes to minimise their tax burden. However, corporate practices of aggressive tax planning and tax evasion came under scrutiny when the costs of the financial and economic crisis grew. The Commission has highlighted how aggressive tax planning is contrary to the principles of corporate social responsibility.[683] *Summa summarum,* internal market actors abused their *privileges*. This abuse has harmed society and the legitimacy of the internal market, and it has been placed under scrutiny.

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[680] See above Ch. 7.2.3.

[681] Council Dir. (EU) 2015/121, Article 1(2).

[682] Article 1(2) Dir. 2011/96/EU.

[683] Ibid.

On the other hand, Financial Transaction Tax the free movement of capital and property rights by creating a new category of a taxable financial asset. According to the European Commission, the FTT nevertheless preserves the free movement of capital because it does not apply to currency transactions on the spot market. The FTT does not apply to most day-to-day financial activities relevant for citizens and businesses, such as contracts, mortgage lending, consumer credits, enterprise loans or payment services.[684] It does, however, cover derivatives contracts based on currency transactions, establishing a *de jure* negative intervention in property rights by establishing a new taxable property element. It can also be seen to establish *de facto* a negative intervention in the scope of free movement of capital because taxation may inhibit transactions, even if only marginally.[685] This negative intervention potentially influences all PLEs in the internal financial markets, not just corporate entities.

Chapter 7.2.3 also described measures taken in the field of Value Added Taxation (VAT). Here again, although *de jure* the legal duty of the corporate entity to pay taxes did not substantially change, more efficient enforcement of VAT laws and anti-counterfeit measures constitute a negative intervention in the sphere of liberty by increasing the possibility of being caught and sanctioned for violations. Such regulation *de facto* influences the sphere of fundamental market liberties and rights *versus status quo ante.* (Table 13.)

[684] COM/2013/071 final, 3.3.2, [11].

[685] Ibid.

(2) Sharing the costs of the crisis		
(a) Overview	**(b) Impact on Legal Powers**	
Single Resolution Fund	Right to property (*de jure)* ↓	Fundamental market right as *general rights* → Influences all legal entities acting in the banking and financial market
Financial transaction tax	Free movement of capital (*de facto*) ↓	Internal market liberties as *particular liberties* → Influences all legal entities acting in the internal financial market
Enforcement rules on tax supervision	Freedom of establishment (*de facto*) ↓	Internal market liberties as *particular liberties* → Influences corporate entities with subsidiaries in the EU
	Free movement of capital (*de facto*) ↓	
	Banking secrecy (*de facto*) ↓	Intellectual property right as *a general* fundamental market right → Influences all legal entities acting in the banking financial sector

Table 13. Impact of measures taken to share the costs of the crisis on the legal powers of corporate entities.

(c) Impact on Legal Relations

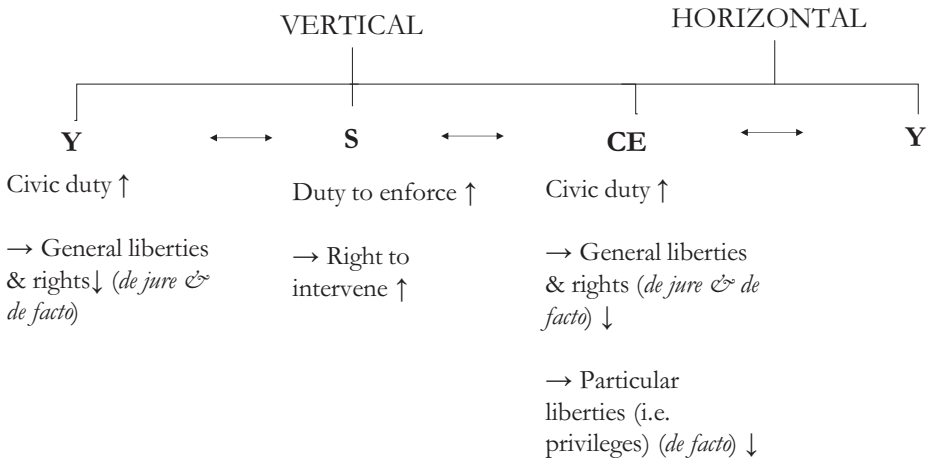
The measures adopted to sharethe costs of the crisis primarily affect vertical legal relations. As with the measures adopted in response to the causes of the crisis, they increase the legal duties for both corporate persons (CE) and natural persons (Y) in the financial and banking sector and the legal duties of for-profit corporations with subsidiaries in the Member States (CE). However, the measures adopted to share the costs of the crisis do not influence the horizontal relations of corporations with other corporate entities or natural entities because issues of taxation and the establishment of the Single Resolution Fund are relevant only in vertical power relations.

As with the measures adopted to respond to the causes of the financial crisis, the measures adopted to share the costs of the crisis directly influence the relations between the State (S) and private law entities (CE, Y). Again, this limits the sphere of autonomy for corporate entities and other private law entities. As with the measures responding to the causes of the crisis, the State has established *civic duties*.

The outcome does not directly benefit the obligated parties but serves the public interest and public policies. (Figure 14.)

As was the case with measures responding to the causes of the crisis, the measures aiming to share the costs of the crisis constitute a negative intervention in the autonomy enjoyed by corporate entities and natural entities from the State compared to the *status quo ante*. In the case of corporate entities, this reduces their autonomy from the State, enhancing their nature as artificial entities, as State constituencies.

Figure 14. Impact of measures taken to share the costs of the crisis on corporate legal relations.



8.2.3 Corporate Entities & Distributing the Benefits

(a) Overview

The economic crisis seemed to reveal the vulnerability of the European Social Market Model based on competition in terms of the ability of markets to distribute the benefits generated. In addition to adopting measures that respond to the causes of the financial crisis and share the costs of the bailout and the economic crisis, the European Union paid attention to sharing the benefits created by the market economy. As Chapter 7.2.4 described, the measures adopted to respond to the issues posed and perpetuated by the economic crisis consist of rules enhancing the

supervision and enforcement of market abuse regulation, the market position of small and medium-sized enterprises (SMEs) and social enterprises and the protection of consumers, posted workers and of passive and minority shareholders.

The supervision and enforcement legislation adopted since the onset of the crisis aims to ensure that competitively important entities comply with the pre-existing prohibition of market abuse. The adoption of the Market Abuse Regulation (EU) 596/2014 strengthened administrative sanctions for market abuses and the investigative powers of national authorities to detect abuse in the financial market. On the other hand, Directive 2014/57/EU established strict criminal sanctions for intentional market abuse. Likewise, Directive 2014/65/EU tackled market abuse stemming from technological development in the markets for financial instruments. Small and medium-sized enterprises and social enterprises were supported by reducing the administrative burden and providing easier access to funding and public contracts[686].

Protection of posted workers was through more efficient implementation of monitoring of terms and conditions of employment of the original Posted Workers Directive[687]. The new Consumer Protection Directive and alternative dispute resolution for consumer disputes strengthened consumer protection and their position in the market[688]. To foster the relationship between corporations and their shareholders in all industrial sectors, measures in corporate governance aim to protect passive and minority investors.[689]

(b) Impact on Legal Powers

Market abuse weakens competition and inhibits the fair distribution of benefits. As Chapter 7.2.4 described, the EU tackled market abuse issues by enhancing the competencies of competition authorities, imposing stricter administrative sanctions and establishing criminal sanctions for market abuse. Raising financial sanctions is a *de jure* negative intervention in property rights, while more efficient supervision and enforcement of competition rules constitute a *de facto* negative intervention by making it harder to break these pre-existing rules without consequences.

To better distribute benefits to small businesses and to support social sustainability, the European Union adopted measures that impact the fundamental

686 See above Ch. 7.2.4.

687 Ibid.

688 Ibid.

689 Ibid.

market right to equal treatment. SMEs and social businesses with social, environmental and community objectives are provided with advantages to strengthen their position in the internal market of public procurement[690], 'to enable procurers to make better use of public procurement in support of common societal goals'.[691] Raising the procurement threshold to 500,000 euros constitutes *de facto* a negative intervention in the fundamental market right to be treated equally. It also constitutes a *de facto* negative intervention in the principle of non-discrimination. Particularly in the internal market for public procurement, the principle is that nationality should not matter. However, smaller businesses are often also local businesses. The measures supporting their access to the public procurement market constitute a *de facto* negative intervention in the right to be treated equally irrespective of nationality.[692]

Moreover, the revised State aid rules enhance the position of smaller and local businesses, including private entrepreneurs.[693] This constitutes a *de jure* negative intervention in the right to equal treatment. As a basic assumption, State aid is against EU law (Article 107(1) TFEU). The prohibition of State aid stems from the principles of non-discrimination and equal treatment aiming to protect fair competition.[694] However, based on Article 107(3) TFEU that allows aid given to promote economic development in areas with abnormally low living standards or unemployment, more favourable treatment has been provided for smaller and local businesses to tackle the social costs of the crisis. Without a change in Article 107 TFEU, interpretation of what constitutes prohibited State aid has changed to the same effect - a *de jure* negative intervention in the principles of non-discrimination and equal treatment. (Table 14.)

The objective of distributing the benefits created by the market has also influenced the contractual relations of corporate entities, particularly those with natural persons. The measures adopted create rights for posted workers, consumers,

690 See above Chs. 7.2.4 & 7.2.5.

691 Ibid.

692 See above Ch. 4.3.1.2.

693 COM/2011/0896 final, 5, [26].

694 See above Ch. 4.3.2.3.

and passive and minority shareholders.[695] The creation of rights for these groups has resulted in corresponding legal duties for CEs, both *de jure* and *de facto*. The regulation adopted to enhance the protection of posted workers aims at more efficient enforcement through implementation, monitoring and administrative cooperation, especially regarding decent working and living conditions for seasonal workers. Authorities' access to information on posted workers is secured.[696] In consumer protection, the adoption of alternative dispute resolution (ADR) for consumer disputes enhanced the enforcement of consumer rights.[697] In addition to this *de facto* impact, the 2014 Consumer Rights Directive enhanced consumer access to information and established rules for withdrawals in distance and off-premises

(3) Distributing Benefits I: Enhancing competition		
(a) Overview	**(b) Impact on Legal Powers**	
Criminal sanctions Enhanced supervisision Tackling market abuse stemming from technologically enhanced financial market	Right to property (*de jure & de facto)* ↓ Freedom of business (*de jure & de facto)* ↓ Contractual freedom (*de jure)* ↓ Intellectual property rights (*de jure)* ↓	Fundamental market right as *general rights* → Influences all legal entities acting in the banking and financial market
Enhancing competitive position & access to public procurement market for SMEs and social business	Fundamental market right to equal treatment (*de jure & de facto)* ↓	Internal market right to equal treatment as a *particular right* → influences legal enitites acting in the financial and procurement market, providing particular support for SMEs and social business

Table 14. Impact of measures taken to distribute benefits created by market by enhancing competition on the legal powers of corporate entities.

[695] It is here intriguing how the EU protects the rights and interests of the shareholders, even though shareholders do not have legally recognised rights per se. While the Charter of Fundamental Rights protects the rights and interests of consumers and workers, the interests of minority and passive shareholders justify the negative intervention on freedom of business and contractual freedom.

[696] See above Ch. 7.2.4.

[697] Dir. 2013/11/EU, which amended Reg. (EC) No 2006/2004 and Dir. 2009/22/EC.

(3) Distributing the Benefits II: Protecting weaker parties		
(a) Overview	**(b) Impact on Legal Powers**	
Consumer protection	Freedom of business (*de jure & de facto)* ↓	Fundamental market right as *general rights* → Influences all legal entities operating in the consumer market or using posted workers
Protection of posted workers	Contractual freedom (*de jure & da facto)* ↓	
	Intellectual property rights (*de jure & de facto)* ↓	
Protection of minority and passive shareholders	Contractual freedom (*de jure & da facto)* ↓	Fundamental market rights as *general rights* → influencing all listed companies

Table 15. Impact of measures taken to distribute the benefits created by the market by protecting weaker (pre-)contractual parties.

contracts[698]. The enhancement of the protection of posted workers and consumers constitutes a *de jure* negative intervention in the freedom of business, freedom of contract and right to business secrets. Measures adopted concerning corporate governance aim to protect minority and passive shareholders, thereby influencing corporate autonomy.[699] It also influences the contractual freedom of the associated entities through the formulation the articles of association. (Table 15.)

(c) Impact on Legal Relations

How did the measures adopted to tackle market abuse influence the legal relations of corporate entities? In principle, they constitute a negative intervention in the fundamental market liberties and rights enjoyed by both corporate and natural persons. However, in practice, most market abuse cases involve such an accumulation of economic power that is inbuilt into the legal personhood of corporate entities.[700] However, the accumulation of economic power and the use of

[698] Dir. 2011/83/EC, Preambles, [5].

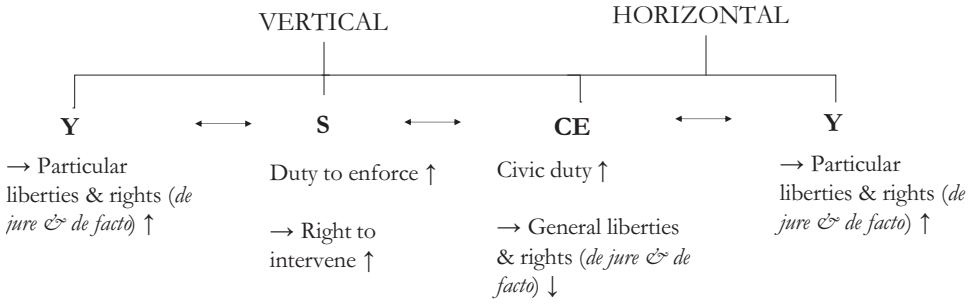
[699] See above Ch. 7.2.4.

[700] The social purpose of corporate entities is to accumulate economic power and, thus, create economic efficiency. This is one of the key rationales for establishing corporations and providing them with separate legal personhood, particularly in the case of limited liability companies (LLCs). Tackling market abuse constitutes a negative intervention in the freedom of business and contract, limiting the

that power is regulated to ensure that the benefits created by the increased economic efficiency are adequately distributed.[701] When wealth and its adequate distribution became a question during the economic crisis, market abuse regulation aimed to ensure that competition worked. This regulation influenced the vertical relations between the corporations and the State by enforcing the *civic duty* of powerful market actors to refrain from abusive practices and subjecting the violators to strengthened sanctions.

In addition to the aforementioned impact on the vertical legal relations of corporations, the measures adopted to distribute the benefits created by the market have a direct effect on the horizontal relations of corporations. The measures adopted focus on contractual relations. Firstly, they impact the pre-contractual and contractual market relations with employees and customers. The European Union has adopted measures constituting a *positive intervention* in the legal rights of posted workers and consumers. These measures come with a *corresponding negative intervention*

Figure 15. Impact of measures adopted to distribute the benefits created by the market on corporate legal relations.



accumulation and use of economic power in the market. This economic power enabling corporate entities to create social benefits was limited because the costs of their freedoms exceeded the benefits, that is, the distribution of the accumulated wealth in the form of affordable high.quality products and services. (See below Ch. 8.3.2.)

[701] Chapter 6.2.2 described how the principles of the European Union originated from the principles of the German Social Market Economy, *Soziale Marktwirtschaft*, built on market-based competition. Article 3(3) TEU states how the economic development of Europe shall be based on a highly competitive social market economy. Although in principle all anti-competitive practices are prohibited, they can be allowed if they serve the same objective as the principle of competition: to distribute wealth in society. Article 101 on the prohibition of anti-competitive agreements states allows anti-competitive practices 'improving the production or distribution of goods or promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit' (Article 101(3) TFEU).

in the liberties and rights of the stronger contractual party, the corporation. (Figure 15.)

The relations of the corporation to its employees and consumers are *external relations*. Even though they are contractual relations, they have been regulated. Employees and consumers (Y) enjoy fundamental rights in the European Union and these rights are protected by statutory legislation in their pre-contractual and contractual relations with corporations (CE). The rights of posted workers and consumers have been strengthened to enhance their position in the market. However, how the measures adopted also intervene with the *internal horizontal* relations of corporations is perhaps more interesting. The European Union has adopted measures constituting a *positive intervention* in the legal rights of passive and minority shareholders that create *corresponding negative intervention* in the liberties of the corporation. The protection of passive and minority shareholders is not based on their fundamental rights.

Nevertheless, the EU has adopted legislation allows it to defend the interests of passive and minority shareholders – not to enforce a contract based on *pacta sunt servanda*, but to enforce legal norms. The intervention in the position of passive and minority shareholders intervenes in the contractual relations of corporations and their shareholders. This act simultaneously decreases the level of autonomy of a corporate legal entity (CE) from its associated entities[702]. However, as the act is based on statutory legislation and not a contract between the CE and its shareholders, it decreases the autonomy from the State (S).

8.2.4 Corporate Entities & Promoting Socially Sustainable Business

(a) Overview

In the 'renewed EU strategy 2011–14 for Corporate Social Responsibility', the European Commission stated how

[702] If associated entities were also to include nonshareholders, like employees and consumers, they could be considered to constitute the same groups, e.g. Y, instead of dividing them into two separate groups, i.e. Y and Z. However, as discussed in Chapter 2.1.2, most aggregate entity theorists include only shareholders. This research has not so far evinced any strong argument to the contrary. Here, the question of 'membership' is not so relevant to answer to the research question, and is omitted. However, the question should be considered in later research.

> The economic crisis and its social consequences have to some extent damaged consumer confidence and levels of trust in business. They have focused public attention on the social and ethical performance of enterprises.[703]

To enhance the ethical and social performance of business and support socially sustainable business practices, the Union adopted measures related to corporate social responsibility, the production of services with general economic interests and public procurement, and promotion of social business. While the measures supporting social enterprises enhance competition, they also enhance socially sustainable business practices. According to the European Commission, social entrepreneurs 'exhibit an especially high level of social and environmental responsibility'.[704] Furthermore, the Commission considers social entrepreneurs more aware of the shared values of the European Union.[705] Here again, the impact of these measures on the legal powers of corporate entities varies significantly from business to business. Variables include, among others, the size of the CE and the nature of its business.

As Chapter 7.3 highlighted, the measures adopted by the Union consist mainly of direct financial support or establishing a market-like mechanism that provides monetary incentives for businesses to adopt socially responsible business practices. Some measures have an indirect impact via framework regulation requiring more transparency. Indeed, most of the measures adopted do not directly impact the legal powers of CEs as a whole. In some cases, the impact is more subtle, for example, measures adopted to support social enterprises.

(b) Impact on Legal Powers

Firstly, the raising of the procurement threshold to 500,000 euros and imposing only respect for the basic principles of transparency and equal treatment, the revised state aid rules enhance the position of smaller and local businesses, including private entrepreneurs, compared to the *status quo ante*.[706]

Also, the new Public Procurement Directive outlines how '[e]mployment and occupation contribute to integration in society and are key elements in guaranteeing equal opportunities for all'[707]. Directive 2014/24/EU on public procurements also

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[703] COM/2011/0681 final, 1.3, [2].

[704] COM/2011/0682 final, 1, [15]. See e.g. COM/2011/0206 final.

[705] See COM/2011/0015 final.

[706] COM/2011/0896 final, 5, [26].

[707] Dir. 2014/24/EU, Preamble, [36].

addresses how tendering criteria may be used to require compliance with ILO contracts throughout the entire supply chain.[708] It also recognised the significant role of 'social businesses whose main aim is to support the social and professional integration or reintegration of disabled and disadvantaged persons, such as the unemployed, members of disadvantaged minorities or otherwise socially marginalised groups'.[709] The directive also recognises that the challenge for social businesses is that they 'might not be able to obtain contracts under normal conditions of competition'.[710] This regulation does not create new legal duties for corporate entities. Instead, they rely on public authorities to use their resources, use their powers and confer upon the producer a contractual duty to deliver. Nevertheless, indirectly, the policies favour local businesses, and *de facto* narrow the scope of internal market rights to equal treatment in public procurement.

The promotion of socially sustainable business also resulted in adopting a provision in the new Public Procurement Directive allowing the exclusion of operators with a history of legal violations.

> Contracting authorities should further be given the possibility to exclude economic operators which have proven unreliable, for instance because of violations of environmental or social obligations, including rules on accessibility for disabled persons or other forms of grave professional misconduct, such as violations of competition rules or of intellectual property rights. It should be clarified that grave professional misconduct can render an economic operator's integrity questionable and thus render the economic operator unsuitable to receive the award of a public contract irrespective of whether the economic operator would otherwise have the technical and economical capacity to perform the contract. [711]

This places business operators in different positions based on their past behaviour, again, a *de jure* negative intervention on the fundamental market right to equal treatment. However, like several other measures adopted to promote socially sustainable business, these do not constitute a direct intervention in fundamental market liberties, such as freedom to do business. They do not, for example, totally prohibit opportunities of practising business from actors that have violated laws .

The measures taken to promote economically, environmentally and socially sustainable business include adopting the Country-by-Country Report Mechanism. The CBCR constitutes a negative intervention on intellectual property right by

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[708] Directive 2014/24/EU, Preambles, (98)–(99).

[709] Dir. 2014/24/EU, Preamble, [36].

[710] Ibid.

[711] Ibid., Preambles, [101].

requiring reporting.[712] However, the CBCR also influences fundamental market rights to equal treatment. The CBCR targets financial companies, companies operating in the extractive and forest industries, and multinational companies with more than 500 employees.[713] Business entities are placed in different positions based on their *size, country of operation* and *sector of activity*. These measures, hence, constitute a *de jure* negative intervention on the right to be treated equally. (Table 16.)

We move on to consider how these measures and their impact the legal powers of corporate entities affect the horizontal and vertical relations of corporations and their level of autonomy from the States, associated natural entities, and other stakeholders.

(4) Promoting Socially Sustainable Business		
(a) Overview	**(b) Impact on Legal Powers**	
Establishment of CBCR Mechanism	Intellectual property rights (*de jure & de facto*) ↓	Business secrets as *general market right* → Large and multinational corporations; extractive and forest industries; credit institutions.
New rules and guidelines on production of services with general economic interests and public procurement Promotion of social business	Fundamental market right to equal treatment (*de jure & de facto*) ↓	Right to equal treatment as general market right→ Positive discrimination of businesses with socially responsible business practices & social businesses

Table 16. Impact of measures taken to promote socially sustainable business.

[712] Ibid., Preambles, [36].

[713] See above Ch. 7.2.5.

(c) Impact on Legal Relations

To support global equality, in 2014, the Commission adopted a 'rights-based approach'. The rights-based approach meant 'encompassing all human rights in EU development cooperation, including private sector development support'. Here, the expectation is that companies that receive development support 'respect human rights':

> Companies investing or operating in developing countries should ensure that they have policies in place to prevent bribery and tax evasion, and systems to assess risks and mitigate potential reverse impacts related to human rights, labour, environmental protection and disaster-related aspects of their operations and value chains, including through meaningful engagement with governments, social dialogue partners and NGOs. Adherence to social, environmental and fiscal standards is also considered a precondition for any EU engagement with, or public support to, the private sector. *Responsible business practices by companies will be reinforced through the promotion of consumer awareness concerning sustainable consumption and production patterns and practices, and the promotion of fair and ethical trade.*[714]

Although the rhetoric involves rights, human rights do not extend outside contractual relations. Promoting socially sustainable business does not extend corporate duties in horizontal relations outside contractual relations. To this extent, the crisis has not changed the legal relations *status quo ante*. The legal duties of corporations in horizontal relations remain duties of the stronger party in contractual and pre-contractual market relations.

The measures promoting socially sustainable business create a framework that incentivises businesses to comply with social values and ethical standards. However, legal obligations are not directly connected with human rights, although they can have a positive impact. One example of this is the Parliament and Council Regulation (EU) No 995/2010 laying down the obligations of operators putting timber and timber products on the market. The Preamble states how:

> Illegal logging is a pervasive problem of major international concern. It poses a significant threat to forests as it contributes to the process of deforestation and forest degradation, which is responsible for about 20% of global CO 2 emissions, threatens biodiversity, and undermines sustainable forest management and development including the commercial viability of operators acting in accordance with applicable legislation. It also contributes to desertification and soil erosion and can exacerbate extreme weather events and flooding. *In addition, it has social, political and economic implications, often undermining progress towards good governance and threatening the livelihood of local forest-dependent communities, and it can be linked to armed conflicts.* Combating the

[714] COM/2014/263 final, 2.4.1, [2]. Emphasis by S.R.

> problem of illegal logging in the context of this Regulation is expected to contribute to the Union's climate change mitigation efforts in a cost-effective manner and should be seen as complementary to Union action and commitments in the context of the United Nations Framework Convention on Climate Change.[715]

While mentioning the impact of illegal logging on the livelihood of local forest-dependent communities, no further references to social objectives are made. There seems to be no guarantee that any measures will (or even should) promote this social commitment. There are no guarantees that local laws do so, nor extraterritorial duties for business, extending their duties beyond local legislation. The EU Timber Regulation adopted by the European Parliament and the Council in October 2010 prohibits putting illegal timber and timber products on the internal market. Nevertheless, it relies on cooperation between businesses, local legislators, NGOs and the European Union through Codes of Conduct.[716]

The impact of the measures on horizontal relations is indirect. They afford citizens, citizens' representatives and non-government organisations (NGOs) access to information on corporate social behaviour. However, they do not alter the legal relations of corporations and stakeholders. They are expected to direct corporations towards more sustainable practices *via* contractual relations. In a strict legal sense, the measures only influence the vertical relations between the State (S) and corporate entities (CEs).

The State exercises legal power over CEs by establishing legal duties that limit their autonomy, even if the legislation does not directly intervene in the operations of the CE, but how it reports them. The measures adopted to promote sustainable business reduce the level of autonomy of corporations from the State. (Figure 16.) Indirectly they can also be seen to lower the level of corporate autonomy from the associated natural entities (shareholders) and other stakeholders (e.g. local communities, surrounding civil society) by subjecting their performance to public scrutiny. This is not, however, a *legal relation* in *senso stricto*. As stated above, the values and interests of the shareholders and other stakeholders are expected to be challenged through their contractual relations, enhanced by measures adopted to protect employees, consumers and passive and minority shareholders.[717]

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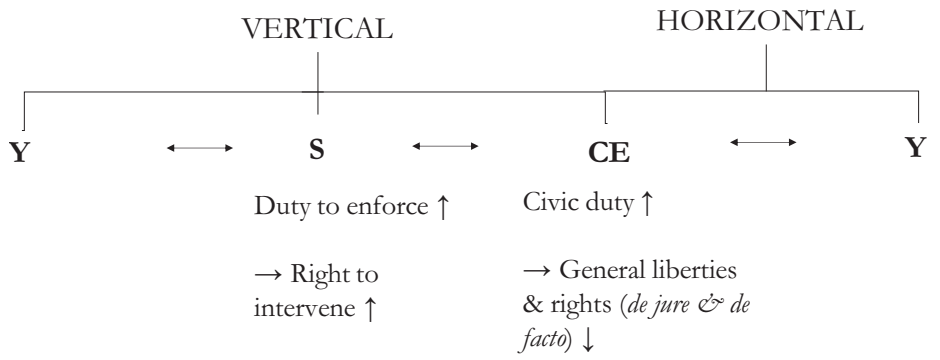
[715] Reg. (EU) No 995/2010, Preambles, [3]. Emphasis by S R

[716] See Illegal logging: http://ec.europa.eu/environment/forests/illegal_logging.htm (Aceessed on 18 August 2017).

[717] See above Chs. 7.2.5; 7.3; 8.2.3.

Figure 16. Impact of measures adopted to promote socially sustainable business on corporate legal relations.



The fact that crisis measures tackling social outcomes of corporate behaviour do not establish legal duties for corporations to protect fundamental and human rights in horizontal relations outside contractual relations resonates with the principles of legal governance of corporations stating that the primary objective of corporate entities as autonomous legal entities is to enhance economic efficiency and transactions. Therefore, the following chapter studies how the crisis measures reflect the four principles of legal governance of corporate entities formulated in Chapter 6.4.

8.3 Crisis Measures & General Principles of the Legal Governance of Corporations

8.3.1 Principle I: "Social development with improved competitiveness…"

The first principle of legal governance of corporate entities outlined the establishment of separate legal personhood for corporate entities. It recognised how different types of associations might be provided with legal personhood for suitable societal purposes. On the establishment of legal personhood for corporations, the study started from Article 54(1) TFEU, which states:

> *Companies or firms formed in accordance with the law of a Member State and having their registered office*, central administration or principal place of business within the Union shall, for

> the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States.[718]

Chapter 6.4.2.1 recognised how, unlike in the case of natural persons, corporations might be stripped of their personhood. Hence, Principle I assumed the following form:

> Associations may be provided with legal personhood to pursue some appropriate societal purpose. The legal personhood of the association is limited to the life sphere necessary for that purpose.
>
> Corporate entities may be provided with separate legal personhood limited to the commercial life sphere to enhance economic efficiency and transactions. The legal personhood of a corporate entity may be removed or considered invalid if (a) it does not practise its purpose, i.e., business, or (b) its practices harm the general interests or are contrary to social values.

Do the measures adopted in response to the challenges posed and perpetuated by the financial and economic crisis reflect this principle? Or have they changed the societal purpose and personhood of CEs as described by the principle?

The focus on the social impact of business, both locally and globally, increased during the economic crisis. Nevertheless, as Chapter 8.2.4 described, the measures adopted by the Union do not reflect paradigmatic changes in corporate legal relations. Instead, the measures adopted also reflect the importance of contractual and pre-contractual market relations and the need for corporations to benefit from adopting socially responsible practices.

In vertical relations, access to EU structural funds is steered towards supporting 'the development of CSR, especially amongst SMEs, and to partner with companies to better address problems such as poverty and social inclusion'.[719] Access to EU funding for European businesses operating in developing countries requires demonstration 'that their operations are compliant with environmental, social and fiscal standards, including respect for human and indigenous rights, decent work, good corporate governance and sector-specific norms',[720] as well as exploring other 'opportunities for financing further research and innovation on CSR'.[721] Also, corporations with socially responsible practices may gain an advantage in public procurement, as described above in Chapters 7.2.5 and 8.2.4.

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[718] Emphasis by S.R. See also above Ch. 5.1.

[719] COM/2011/0681 final, 4.7, [1].

[720] COM/2014/263 final, 2.1, Box 1(6).

[721] COM/2011/0681 final, 4.6, [2].

In internal vertical relations, the idea is represented in the measures taken on corporate governance. According to a Commission Staff Working Document assessing the impact of the proposal for amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement and Directive 2013/34/EU as regards certain elements of the corporate governance statement, as well as the Commission recommendation on the quality of corporate governance reporting establishing the 'comply or explain' policy, stated how

> [t]he overarching objective of this initiative is to contribute to the long-term sustainability of EU companies and to the creation of an attractive environment for investors in order to contribute to growth, jobs and EU competitiveness.[722]

These measures recognise that a trusting relationship between investors and companies is necessary for transactions, and transactions are necessary for economic growth.[723] The same applies to the relationship between business and other stakeholders, such as consumers, discussed further in the next chapter. Chapter 8.2.4 concluded that crisis measures did not extend corporate legal duties outside these market relations. Measures taken to enhance the consideration of human rights in business reflect voluntarism strengthened with positive economic incentives.

The measures adopted in response to the challenges posed and perpetuated by the financial and economic crisis reflect how the societal purpose of corporations as associations has not changed. The measures adopted by the Union to tackle the social issues, in particular, requires that business needs to benefit financially from adopting more socially and environmentally responsible practices, or practices that are more considerate of the interests of shareholders or customers. Thus, *summa summarum*, the measures adopted to respond to the challenges posed and perpetuated by the crisis are consistent with Principle I, despite all the regulatory changes.

The next chapter studies the relation of the crisis measures to the general principles of legal governance of general and particular liberties and rights enjoyed by CEs. In addition to recognising how the crisis measures reflect Principles II and III, this examination should confirm the notion that the purpose of CEs as associations is to do business as per Principle I as this purpose is reflected in corporate legal powers and legal relations.

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[722] SWD/2014/0127 final, 7., [1].

[723] See e.g. COM/2011/0164 final, 2.1.

8.3.2 Principles II-III: "As we work together to restore growth and competitiveness…"

8.3.2.1 The Objectives

While Principle I determined the recognition of corporate entities as autonomous legal persons, Principles II and III determined the establishment and governance of corporate legal powers. Principle II recognises that corporate entities have the legal power necessary to achieve their purpose*, i.e.* to do business:

> The legal powers of corporate entities include liberties and rights necessary for acting in the commercial life sphere. Corporate entities, as market entities, enjoy fundamental market liberties and rights. The fundamental market liberties and rights of corporate entities may be intervened to any efficient measure to support *Union objectives, general interests recognised by the Union, or the fundamental non-market liberties and rights of natural persons*.

Principle III, on the other hand, recognises cases where corporations as legal entities may be provided with particular liberties and rights:

> Corporate entities may have legal or contractual privileges and corresponding rights to *support Union objectives or general interests recognised by the Union*. The particular liberties and rights of the corporate entity may be intervened in any efficient measures to achieve Union objectives or to protect general interests recognised by the Union or promote fundamental non-market liberties and rights of natural persons.

Corporate entities may be provided with legal powers to enable their societal purpose or extend their legal powers to support particular social objectives or values. Correspondingly, the legal powers of CEs may be limited to ensure the realisation of their societal purpose or particular social objectives or values. How do the crisis measures reflect this relationship between social objectives and values and the corporate legal powers? This chapter will examine the measures influencing the corporate enjoyment of general and particular liberties and rights from the perspective of the *objectives* of the intervention, whether negative or positive. The examination considers the role of (1) the protection and achievement of Union objectives, (2) the protection of general interests recognised by the Union and (3) the protection and promotion of fundamental non-market liberties and rights in the crisis measures. The following chapter, Chapter 8.3.2.2, will then consider the relationship between objectives and *how they are pursued* and h*ow the selection of means reflects the evaluation of the efficacy of measures*.

(1) Protection & Achievement of Union Objectives

As Chapter 4.3.2 described, Article 3 of the Treaty on European Union recognises the objectives of the European Union. The Article recognises various objectives, such as promoting peace and upholding the Union's values and protecting human rights. Chapter 5.3.2 demonstrated how, from among these various objectives, the economic and environmental objectives were the primary sources of negative intervention on the liberties and rights of CEs. The enforcement of competition in particular has resulted in a vast array of legal duties. On the other hand, technological and social objectives were pursued primarily through legal and contractual privileges providing positive economic incentives.

The objectives of the measures adopted during the crisis period emphasise the protection of the economic objectives achieved by the Union, particularly the level of market integration attained, but also balanced economic growth and competition. These objectives were integrated into almost every action taken, whether to respond to the causes of the crisis, to share the burden, or distribute the benefits.[724]

The Commission Action Plan to strengthen the fight against tax fraud and tax evasion, for example, evaluated how

> [t]aking into account the freedoms awarded to them when operating in the internal market, businesses may structure arrangements with such jurisdictions via the Member State with the weakest response. As a result, the overall protection of Member State's tax revenues tends to be only as effective as the weakest response of any one Member State. This does not only erode Member States' tax bases but also *endangers fair competitive conditions* for business and, ultimately, *distorts the operation of the internal market*.[725]

Taxation also connects with the objectives of competition, competitiveness and growth. *Algirdas Šemeta*, Commissioner for Taxation in 2014, highlighted the equal sharing of tax burden and its impact on Union objectives:

> *Fair tax competition is fundamental for a healthy Single Market and our common economic prosperity*. As we work together to *restore growth and competitiveness, it is essential to tackle the harmful tax practices* which erode the tax bases of EU Member States. Fair play in taxation must be the rule.[726]

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[724] See above Ch. 8.2.

[725] COM/2012/0722 final, 3.7, [2]. Emphasis by S.R.

[726] IP/14/1105, [2].

The Union objectives are also integrated into measures influencing the internal and external horizontal relations of CEs, taken to distribute the benefits created by the market.[727]

To foster the relationship between corporations and their shareholders in all industrial sectors, measures taken in the area of corporate governance aim to protect passive and minority investors and 'curb harmful short-termism and excessive risk-taking' by managers. These measures cover both businesses inside and outside the financial and banking sector. Excessive risk-taking in the financial and banking sector is curbed with remuneration policies.[728] A Commission Staff Working Document, assessing the measures taken to encourage long-term shareholder engagement establishing the 'comply or explain' policy, stated how

> [t]he overarching objective of this initiative is to contribute to the long-term sustainability of EU companies and to the creation of an attractive environment for investors in order to *contribute to growth, jobs and EU competitiveness*.[729]

These measures recognise that a trusting relationship between investors and companies is a requirement for economic growth.[730]

Two of the Asset Quality Review (AQR) main goals described above in Chapter 8.2.2 were to increase transparency and build confidence, assuring all stakeholders that banks are fundamentally sound and trustworthy.[731] On the other hand, the objectives of the Asset Quality Review and the Single Resolution Mechanism was to restore consumers' trust in the banks.

> Banks and investment firms (hereinafter institutions) provide vital services to citizens, businesses, and the economy at large (such as deposit-taking, lending, and the operation of payment systems). They operate largely based on trust, and can quickly become unviable if their customers and counterparties lose confidence in their ability to meet their obligations.[732]

The restoration of trust was closely connected to the objective of market integration. By strengthening consumer rights in the banking sector and other sectors, the Union eansured the further development of the internal market for consumers. The Consumer Rights Directive of 2011 directly intervened in the freedom of business

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[727] See above Ch. 8.2.3.

[728] See above Chs. 7.2.4 & 8.2.4. See also Dir. (EU) 2017/828; 2014/208/EU.

[729] SWD/2014/0127 final, 7., [1].

[730] See e.g. COM/2011/0164 final, 2.1.

[731] See above Chs. 7.2.4 & 8.2.4. See also European Central Bank 2013.

[732] COM/2012/0280 final, 3., [2].

through 'full harmonisation of consumer information and the right of withdrawal in distance and off-premises contracts'.[733] The objective of the Directive was to enable better functioning of the business-to-consumer internal market *via* high level of consumer protection.

> In accordance with Article 26(2) TFEU, the internal market is to comprise an area without internal frontiers in which the free movement of goods and services is ensured. *The internal market should provide consumers with added value* in the form of better quality, greater variety, reasonable prices and high safety standards for goods and services, which should promote a high level of consumer protection.[734]

The directive on alternative dispute resolution for consumer disputes also stated how its objective was 'to contribute to the proper functioning of the internal market' and do so 'through the achievement of a high level of consumer protection'.[735]

> [e]nsuring access to simple, efficient, fast and low-cost ways of resolving domestic and cross-border disputes which arise from sales or service contracts should benefit consumers and therefore *boost their confidence in the market*. That access should apply to online as well as to offline *transactions*, and is particularly important when consumers shop across borders.[736]

The European Consumer Agenda entitled 'Boosting confidence and growth' (2012) recognised why it was so important from the perspective of the Union economic objectives to enhance the position and protection of consumers:

> Consumer expenditure accounts for 56% of EU GDP and is essential to meeting the Europe 2020 objective of smart, inclusive and sustainable growth. *Stimulating this demand can play a major role in bringing the EU out of the crisis*.[737]

The measures protecting posted workers also highlight the relationship between employee rights and market integration. As described by the European Commission in its Single Market Act entitled 'Working together to create new growth':

> In a social market economy, a more unified European market in services means being able to ensure, with no race to the bottom, that businesses are able to *provide their services more easily throughout the European Union* (in particular by posting their workers

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[733] Dir. 2011/83/EC, Preambles, (2).

[734] Ibid., (4).

[735] Dir. 2013/11/EU, Art. 1.

[736] Ibid., Preliminaries, [4].

[737] COM/2012/0225 final, 1, [1]. Emphasis by S.R.

> on secondment), whilst at the same time providing more high quality jobs and a high level of protection for workers and their social rights.[738]

The measures taken to pursue the EU's economic objectives seem to overlap with measures contributing to the protection of general interests recognised by the European Union and the fundamental non-market liberties and rights of natural persons. The following section will take a closer look at the role played by these objectives and what they reveal.

(2) Protection of General Interests

As Chapter 4.3.2.2 recognised, the social, economic, environmental, technological and scientific objectives of the EU are closely related to *general interests*. In this research, however, general interests refers to interests constituting *restrictions* on the Union's objectives, particularly its economic objective to establish an internal market with free movement of goods, services, capital and persons. Chapter 4.3.2.3 described how free movement mmay be subject to limitations on grounds of public policy, public security or public health, including the protection of health and life of humans, animals or plants, the protection of national treasures of artistic, historic or archaeological value, and the protection of industrial and commercial property. However, the economic crisis seems to have demonstrated that the Union may adopt measures to advance these objectives on a supranational level, particularly as regards sharing the costs of the crisis and promoting socially sustainable business. Moreover, as demonstrated above, when considering the role played by the EU's objectives in crisis measures, the manner chosen by the EU is such that it is consistent with internal markets.

As Chapter 7.2 described, public finances and ordinary taxpayers took had a heavy burden to bear due to the financial and economic crisis, while the freedom of establishment and free movement of capital affords businesses and individuals opportunities to aggressively plan their taxation. Therefore, protection of tax revenues has not itself justified restrictions on internal market freedoms. However, during the period 2008–2014, the European Union took several measures to tackle the issues related to the loss of tax revenue and unequal distribution of the tax burden. Chapter 7.2.3 described how the reallocation of the costs of the crisis took place via the establishment of Financial Transaction Tax, the establishment of the Single Resolution Fund, and combatting Tax Evasion. Furthermore, the Union

[738] COM/2011/0206 final, 2.10, [2]. Emphasis by S.R.

protected the economic interests of the Member States mainly through measures against tax evasion.

During an economic crisis, the economic interests of Member States relate closely to social and health policies, such as tackling increased unemployment. As Chapter 7.2.5 described, the Union supported these objectives by clarifying the rules on financing services with general economic interests and providing contracting authorities with additional leeway in public procurements. As a result, the authorities gained more freedom to use bidding criteria to protect general interests such as high-level employment, social inclusion, regional cohesion and environmental protection.[739] In addition, the revised EU state aid rules for the assessment of public compensation for Services of General Economic Interest and the new Public Procurement Directive adopted in 2014, highlighting the possibility of procurement authorities permitted the use of other bidding criteria than price to achieve social policy objectives[740] as well as other general interest objectives, such as environmental objectives.[741]

As Chapters 8.2.2 and 8.2.4 established, these measures taken by the Union to protect general interests constitute a negative intervention in both fundamental and internal market liberties and the rights of CEs. In terms of their objectives, these measures are consistent with Principles II and III of the legal governance of corporate entities in the European Union.

The EU protected general interests through the measures taken in various frameworks to provide additional support for SMEs and social business.[742] These measures have a negative impact on the enjoyment of the right to equal treatment as per Principles II and III. They also correspond to Principle III in providing particular liberties and rights for SMEs and social business to achieve general interests.

The various measures to protect general interests connect closely with protecting and promoting fundamental non-market liberties and rights, particularly economic and social rights, considered below. According to the Commission,

> Member States need, in fact, to guarantee certain services at affordable conditions to the general population (e.g. hospitals, education, social services, but also communications, energy or transport). National, regional and local authorities are responsible and enjoy a large discretion in providing, commissioning and organising

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[739] Dir. 2014/24/EU, Preambles, (36); Articles 20 & 70. See COM/2010/2020 final; COM/2011/0681 final; COM/2011/0896 final.

[740] See above Ch 7.2.5.

[741] Dir. 2014/24/EU, Preambles, (36), (41), and (88).

[742] See above Ch. 8.2.4.

> SGEI. [--] Social services, in particular, also help to mitigate the social impact of the crisis.[743]

The measures intertwine with the Union objectives of building a social market and establishing an internal market – as demonstrated above by Algirdas Šemeta's comment. The next chapter will demonstrate how closely the Union objectives are incorporated into the measures taken to protect general interests and fundamental non-market liberties and rights. Before that, however, the next section will look into measures taken to protect and promote fundamental non-market liberties and rights.

(3) Promotion of Fundamental Non-market Liberties & Rights of Natural Persons

The third and final objective that justifies the intervention in the legal powers of CEs, in both Principles II and III, is the promotion of fundamental non-market liberties and rights enjoyed by natural persons. The measures taken to promote fundamental non-market liberties and rights on the supranational level include the abovementioned new Public Procurement Directive highlighting how the procurement process aids authorities in offering high-quality social services connected to several rights recognised in the Charter of Fundamental Rights. The Charter recognises, for example, everyone's right to access social benefits, social services, preventive healthcare, medical treatment and services of general economic interests. (Articles 34–36 CFR.)[744] As described above, these measures have negatively influenced the liberties and rights enjoyed by CEs. However, they do not directly influence their horizontal legal relations with natural persons who enjoy these rights.

As Chapter 5.3.2 demonstrated, the duties of CEs in horizontal legal relations stem primarily from their contractual and pre-contractual market relations. Chapter 8.2.4 concluded that the measures adopted had not altered the nature of horizontal legal relations of corporations. The measures adopted did indeed enhance the rights of posted workers. While employee rights overlap with the fundamental non-market liberties and rights protected by international human rights law and International Labour Law obliging the Member States[745], in the EU context, workers' rights and consumer rights are *particular rights* provided to support Union objectives for social

[743] COM/2011/0146 final, 4, [1].

[744] See above Ch. 5.2.1.

[745] See above Chs. 6.2 & 6.3.2.2–6.3.2.3.

market.[746] The measures adopted to protect posted workers and consumers[747] reflect the general principle of governing the particular liberties and rights of private law entities formulated in Chapter 6.3.2.2. According to this principle

> Particular liberties and rights may be established to grant privileged position for certain types of private law entities pre-determined in the law concerning the nature of their activities based on their expected contribution to Union objectives, general interests recognised by the Union or fundamental non-market liberties and rights.

The limitations of CEs' liberties and rights correspond to the enhancement of the solidarity market rights of workers and consumers rather than fundamental non-market rights. In addition, the enhanced protection of posted workers did not imply a general rise in the level of protection, but merely the application of national standards to workers posted to that country, rather than the standards of the country of origin.

As Chapter 7.2.5 described, many of the measures adopted in response to the social challenges contribute to protecting fundamental non-market liberties and rights, including establishing CBCR and reshaping the rules on SGEIs and public procurement. Although these measures do not create direct horizontal duties for CEs[748], they constitute limitations to their liberties and rights, as Chapter 8.2.4 described. Therefore, the protection of fundamental non-market liberties and rights of citizens inside and outside Europe does constitute at least one of the objectives pursued through the measures adopted.

It is noteworthy that the Union's economic objectives are never far away. The objectives of the CBCR Transparency Directive are to enhance the transparency of environmental and social impacts and facilitate cross-border investment.[749] The SGEI package providing the Member States with 'a simpler, clearer and more flexible framework for supporting the delivery of high-quality public services to citizens', also protects competition by ensuring that 'companies entrusted with services of general interest do not get overcompensated, which safeguards competing activity and jobs'.[750]

Similarly, the Commission proposal for public procurement, which lowered the threshold for tendering to 500,000 euros, evaluated that such an action could be

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[746] See above Ch. 4.4.2.3.

[747] See above Ch. 7.2.4.

[748] See above Ch. 7.3.

[749] Dir. 2013/34/EU, Preambles, (55).

[750] IP/11/1571, [2].

adopted because a 'quantitative analysis of the values of contracts for the relevant services awarded to economic operators from abroad has shown that contracts below this value have typically no cross-border interest'.[751]

These examples demonstrate how the selection of means to achieve objectives, such as the protection of fundamental non-market liberties and rights, is influenced by the efficacy of measures.

8.3.2.2 The Means

Principles II and III establish that intervention in the fundamental market liberties and the rights of corporate entities may concern any *efficient* measure to achieve Union objectives, protect general interests recognised by the Union, or promote fundamental non-market liberties and rights of natural persons. How do the measures adopted in response to the challenges posed and perpetuated by the financial and economic crisis reflect ideas about the efficacy of measures when intervening with the legal powers of CEs?

To evaluate measures, the Commission Secretariat General produces internal guidelines for Directorate Generals. These Impact Assessment Guidelines have been drafted and circulated since 2002 and occasionally updated.[752] For example, in 2010, the Commission published its Better Regulation Programmes referred to as 'Smart Regulation in the European Union'.[753] In 2011, the Commission published Operational guidance on taking account of Fundamental Rights in Impact Assessment.[754] Later, in 2012, the Commission published a Communication of EU Regulatory Fitness. The Commission has published new guidelines since, but this research is particularly interested in the guidelines provided in 2010 and 2012.

The guidelines show a subtle shift in the Commission's attitude towards regulation. In the 2012 Communication on 'EU Regulatory Fitness', the Commission outlined how *not* regulating may *not* be the most cost-efficient solution after all.

> The economic and financial crisis has revealed costs of non-action, weak legislation and enforcement in some areas. It has prompted a call for strengthened economic governance and financial regulation at EU level.[755]

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[751] COM/2011/0896 final, 5, [26].

[752] See e.g. SEC/2005/0791 final; SEC/2009/92.

[753] COM/2010/0543 final. See also the Interinstitutional Agreement on Better Law-Making 2003/C 321/01.

[754] SEC/2011/0567 final.

[755] COM/2012/0746 final, 1, [1]. See also SWD/2012/0422 final; SWD/2012/0423 final.

The financial crisis had shown the failure of self-regulation for banks and financial institutions. The European Securities and Market Authority gained authority to 'protect the integrity and stability of the financial system, the transparency of markets and financial products and the protection of investors', by ensuring 'the correct and full application of Union law'. This is seen as

> [--] a core prerequisite for the integrity, transparency, efficiency, and orderly functioning of financial markets, the stability of the financial system, and for neutral conditions of competition for financial market participants in the Union.[756]

However, the issue of not creating any excess burden for business is kept closely in mind. In the 'EU Regulatory Fitness', the Commission notes the 'costs of EU legislation and the challenges of implementing and enforcing the laws already on the statute books.' It mentions how '[b]usinesses and citizens raise concerns about the complexity and administrative load of laws'.[757] The Commission continues by stating how the issue is related to meeting 'policy goals at minimum cost'.[758] The focus is simultaneously on simplifying rules and reducing the regulatory cost for business and citizens, but 'without compromising public policy objectives'.[759]

The evaluation of costs and benefits for business was considered, for example, in establishing the Financial transaction tax. The general practice has been to avoid tax burden for businesses because of its negative impact on economic growth. The Commission Annual Growth Survey from 2012 reflects how

> Given that empirical studies tend to show that corporate taxes are the most detrimental to economic growth in general, Member States with a relatively high tax burden on corporate income should try to avoid increasing corporate tax rates at the current juncture. By changing the risk-return profile of entrepreneurial decisions, taxes on business profits may distort the capital accumulation and depress investment.[760]

The Commission justified the FTT by stating:

> There is a strong consensus within Europe and internationally that the financial sector should contribute more fairly given the costs of dealing with the crisis and the current under-taxation of the sector.[761]

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[756] Reg. (EU) No 1095/2010, Preliminaries, [27].

[757] COM/2012/0746 final, 1, [1].

[758] Ibid., 1, [3].

[759] Ibid., 2, [4].

[760] COM/2011/0815 final, 2.2, [6].

[761] COM/2011/0594 final, 1.1, [1].

Simultaneously the Commission recognises that due to the overall positive impact in the long run, the costs of FTT for business will be marginal at most:

> Taking into account the mitigating measures provided by the design features of the FTT actually proposed, the negative impact on the GDP level in the long run is expected to be limited to around 0.5% as compared to baseline scenarios.[762]

To the extent that the Union has issued legal duties, the Commission argues how the legislation benefits business. For example, Directive 2014/65/EU on the markets in financial instrument argues how the criteria and process of prudential assessment of financial institutions provide 'legal certainty, clarity and predictability with regard to the assessment process, as well as to the result thereof'.[763]

On the other hand, the European Commission Staff Working Document on implementing enhanced cooperation in the area of FTT recognised how decreasing costs related to social tensions, strikes and political instabilities through the loss of working days are between 0.05 and 0.2% of a country's GDP per day.[764] Hence, strikes create an economic burden for business and society, thus tackling such social tensions is beneficial for business, even with the regulatory costs.

The same logic applies to the relationship between companies and their employees. In its Green Paper on 'Restructuring and anticipation of change: what lessons from recent experience?', the Commission outlined the relationship of human resource management and competitiveness of the company:

> It has been shown that, through its human and psychological consequences, poorly managed restructuring can have a significant negative long-term impact on the human resources of companies, thereby weakening this key resource for competitiveness. Companies and social partners from some sectors undergoing particularly strong change have therefore agreed on guidelines to manage mental health issues at workplaces and are increasingly engaged in managing these challenges.[765]

The measures taken to enhance the position of consumers and support socially responsible business practices were evaluated to create not only compliance costs for CEs[766] but also benefits:

> By addressing their social responsibility enterprises can build long-term employee, consumer and citizen trust as a basis for sustainable business models. Higher levels

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762 Ibid., 2.2, [9].

763 Directive 2014/65/EU, Preambles, (47).

764 SWD/2013/028 final, 6.6, [15].

765 COM/2012/007 final, 17.

766 See COM/2010/0348 final.

> of trust in turn help to create an environment in which enterprises can innovate and grow.[767]

Although the economic crisis resulted in the adoption of hard regulation, particularly in the financial and banking sector, *self-regulation*[768] is nevertheless considered an option, even in critical areas of the economy. The regulatory strategy *status quo post* includes publicly funded programmes encouraging businesses to participate in regulatory programmes. One such programme concerns the development of financial reporting and auditing mechanisms.[769] This programme was basically about co-financing the development of reporting and auditing after the financial markets crisis of 2008 'put the issue of financial reporting auditing at the centre of the Union's political agenda'.[770]

The measures adopted to respond to the economic and social challenges posed and perpetuated by the crisis were selected by evaluating their costs and benefits. Nevertheless, their aim seems to be to ensure that corporate social responsibility is not driven by corporations but by competition. Enforcement of CSR combines several different approaches to tackle the issue, including demand-side, supply-side and voluntary measures.[771] It combines measures enhancing competition, transparency and the market position of consumers and investors and also of social businesses and SMEs. The objective of the regulatory measures adopted is to empower consumers, investors and the public sector to demand more ethical business. Consumers, investors and procurement authorities are alerted to use their influence to support social and environmental objectives by providing 'market reward for responsible business conduct, including through investment policy and public procurement'.[772]

The role of self-regulation remains pivotal. Notably, the various industry-created standards and labels described above in Chapter 6.2 play an incremental role in the execution. For example, while the 2004 Public Procurement Directive already

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[767] COM/2011/0681 final, 1.1, [3].

[768] See above Ch. 6.2.

[769] Decision No 716/2009/EC of the European Parliament and the Council established a Community programme to support specific activities in the field of financial services, financial reporting and auditing.

[770] Reg. (EU) No 258/2014, Preambles, [2].

[771] See COM/2003/0251 final. Comparable issues and conflicts revolve around oil, diamonds and other extractive industries in South America, Africa and Asia – issues which have earned names such as 'conflict minerals', 'blood diamonds', etc.

[772] COM/2011/0681 final, 2, [13].

justified the use of 'social clauses' as tendering criteria[773], the objective of the new Public Procurement Directive was to enhance the use of such clauses. Simultaneously attention was paid to equal treatment and the criteria of various labels become a vital point of reference:

> Contracting authorities that wish to purchase works, supplies or services with specific environmental, social or other characteristics should be able to refer to particular labels, such as the European Eco-label, (multi-)national eco-labels or any other label provided that the requirements for the label are linked to the subject-matter of the contract, such as the description of the product and its presentation, including packaging requirements. It is furthermore essential that those requirements are drawn up and adopted on the basis of objectively verifiable criteria, using a procedure in which stakeholders, such as government bodies, consumers, manufacturers, distributors and environmental organisations, can participate, and that the label is accessible and available to all interested parties.[774]

Standards and labels may be related to the overall social and environmental impact of a business, such as the ISO 26000 standard for social responsibility and the European Eco-label. These are optional for companies. ISO 26000 is currently not even a standard by which companies may be certified, unlike quality control standard ISO 9000. Companies acquire voluntary standards, certifiable or not, as well as labels. They can be considered to provide companies with a competitive advantage over others without such standards or labels. In addition, they provide information for business partners, consumers, investors, procurement authorities and other stakeholders.

Although the economic crisis resulted in the adoption of hard regulation, particularly in the financial and banking sector, *self-regulation* is nevertheless considered an option, even in critical areas of the economy. The regulatory strategy *status quo post* includes publicly funded programmes encouraging businesses to participate in regulatory programmes. One such programme concerns the development of financial reporting and auditing mechanisms.[775] This programme was basically about co-financing the development of reporting and auditing after the financial crisis 'put the issue of financial reporting auditing at the centre of the Union's political agenda'.[776] Such programmes are part of the framework regulation

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[773] Dir. 2004/18/EC, Article 26.

[774] Dir 2014/24/EU, Preambles, (75).

[775] Decision No 716/2009/EC of the European Parliament and the Council established a Community programme to support specific activities in the field of financial services, financial reporting and auditing.

[776] Reg. (EU) No 258/2014, Preambles, [2].

discussed in Chapters 7.3 and 8.2.4. Framework regulation aims to empower demand for more responsible business practices.

The realisation from the crisis experience seems to be that more regulation is required for markets to function well—measures adopted during the crisis aimed at efficient enforcement of pre-established competition rules. Hence, markets may be more efficiently used to advance social policies, social objectives and social values. Curbing market abuse and stabilising the financial and banking sector through 'hard law' measures and negative intervention in the liberties of CEs all aim to enhance the market mechanism, which makes it possible for demand and supply for more socially sustainable products and services to meet.

Due to the selection of appropriate means, the measures create no duties outside contractual relations, irrespective of the 'rights-based approach', as Chapter 8.2.4. described. Adopting socially responsible practices need to enhance their competitive position, provide access to the public procurement market, or otherwise, and contribute to economic growth. This observation relates to Principles II and III as well as to Principle I. The selection of means reflects careful consideration of costs and benefits and also stresses the social purpose of corporations to do business by highlighting how businesses need to benefit business-wise from adopting socially responsible practices.

Nevertheless, do the crisis measures reflect the protection of fundamental non-market liberties and rights of natural persons influenced by the regulation?

8.3.3 Principle IV: "Regulation respects the fundamental rights…"

Principles II and III of the legal governance of CEs outlined that there are no principled arguments against negative intervention with the general or particular legal powers of CEs. On the contrary, principles II and III operated on the model of corporate legal personhood recognising CEs as purely artificial and instrumental entities. The nature of CEs as legal entities makes it possible to intervene in their legal powers and even their legal personhood[777] reagrding any possible measures . However, Principles II and III recognise that public intervention in the legal powers

[777] According to Directive (EU) 2017/1132 relating to certain aspects of company law company may be nullified. The nullification constitutes a negative intervention in the legal powers of the CE as an autonomous entity. It also constitutes a negative intervention in the contractual freedom of the associated natural persons. As natural persons exercise freedom of contract in the economic (commercial) life-sphere, intervention is feasible as long as it meets the efficiency requirement.

of CEs needs to respect the fundamental non-market liberties and rights of natural persons, including absolute rights[778].

Natural persons enjoy fundamental non-market liberties and rights, which may not be encroached on on the grounds of pragmatic arguments alone. Therefore, negative intervention in the non-economic life sphere needs to be justified on grounds of either fundamental non-market liberties and the rights of the persons themselves, the fundamental non-market liberties and rights of other persons, or general interests recognised by the Union.[779] Moreover, to the extent that the measures directed towards CEs affect the fundamental non-market liberties and rights of natural persons, these measures need to be *necessary* to achieve the desired objective, *proportional* to the static value of protection of fundamental rights and *efficient* in terms of costs and benefits.

To the extent that public intervention influences the legal powers of the associated natural persons, the decisive factor is whether they are exercising their legal powers in the commercial or the non-commercial life sphere. When exercising legal power is limited to the commercial life sphere, public intervention in the legal powers of both natural and legal persons may be grounded on purely pragmatic arguments.[780] Principle IV applies if the commercial life sphere overlaps with the non-commercial life sphere.

> The legal governance of corporate entities may not intervene with the fundamental non-market liberties and rights of the associated natural persons unless justified on the grounds of general interests recognised by the Union or the fundamental non-market liberties and rights of themselves or other natural persons. Measures intervening in the fundamental non-market liberties and rights of natural persons must be necessary, proportional and efficient.

The need to consider the fundamental non-market liberties and rights of natural persons is reflected in the measures adopted. Thus, for example, regulation (EU) No. 806/2014 establishing uniform rules for the resolution of credit institutions recognised that the fiscal responsibility of individual shareholders in particular needs to be based on an accurate and realistic evaluation of assets and liabilities.[781] The fiscal responsibility may not exceed the financial contribution made in the commercial life sphere.

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[778] See above Chs 4.3.1 & 6.3.2.

[779] See above Ch. 4.3.1.5.

[780] See above Ch. 4.3.1.

[781] See Reg. (EU) No 806/2014. See also Dir. 2014/65/EU and Reg. (EC) No 1060/2009.

Regulation of the supervision of the financial system's stability, on the other hand, states how '[i]t is essential that the Member States and ESMA protect the right to privacy of natural persons when processing personal data [--]'.[782] Therefore, when publishing information about pecuniary sanctions imposed on financial institutions, their impact on the privacy of individuals is to be considered:

> Every administrative sanction or measure imposed for breaches of this Regulation shall be published without undue delay, including at least information on the type and nature of the breach and the identity of persons responsible for it, unless such disclosure would seriously jeopardise the stability of financial markets. Where publication would cause disproportionate damage to the parties involved, competent authorities shall publish the measures and sanctions on an anonymous basis.[783]

The Council Regulation on conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions ensures respect for fundamental rights:

> This Regulation respects the fundamental rights and observes the principles recognised in the Charter of Fundamental Rights of the European Union, in particular the right to the protection of personal data, the freedom to conduct a business, the right to an effective remedy and to a fair trial, and has to be implemented in accordance with those rights and principles.[784]

To the extent that the measures adopted intervene in the individual liberties and rights of the non-commercial life sphere, the Union seems to have both recognised and protected them. Nevertheless, some issues arise.

Many regulations and regulatory proposals include references to fundamental rights. These references takethe form of 'disclaimer clauses'. These 'disclaimer clauses' are statements about the impact of the regulation on fundamental rights. For example, the market abuse directive of 2014 states how

> [t]his Directive [--] should be applied with due respect for the right to protection of personal data (Article 8), the freedom of expression and information (Article 11), the freedom to conduct a business (Article 16), the right to an effective remedy and to a fair trial (Article 47), the presumption of innocence and right of defence (Article 48), the principles of legality and proportionality of criminal offences and penalties (Article 49), and the right not to be tried or punished twice in criminal proceedings for the same offence (Article 50).[785]

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[782] Reg. (EU) No 648/2012, Preambles, [89].

[783] COM/2012/0073 final, Title V Sanctions, Article 60 Sanctioning powers, [4].

[784] Council Reg. (EU) No 1024/2013, Preambles, [86].

[785] Dir. 2014/57/EU, Preambles, [27].

And,

> [t]his Directive respects the fundamental rights and observes the principles recognised in the Charter of Fundamental Rights of the European Union (the Charter) as recognised in the TEU.[786]

Another example is the European venture capital funds regulation, which aims to enhance the growth and innovation of small and medium-sized enterprises (SMEs). This regulation requires transparency regarding the investment strategy, investment instruments and related risks, remuneration policies and taxes.[787] The Regulation states how it

> [--] respects fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union, including the right to respect for private and family life (Article 7) and freedom to conduct a business (Article 16).[788]

The Directive on the disclosure of non-financial and diversity information by certain large undertakings and groups, which target certain kinds of business, states how

> [t]his Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union, including freedom to conduct a business, respect for private life and the protection of personal data. This Directive has to be implemented in accordance with those rights and principles.[789]

The impact assessments in these cases do not seem to provide much clarity. For example, the impact assessment of the European Venture Capital Funds includes no evaluation of the impact on fundamental rights.[790] On the other hand, the impact assessment of Directive 2014/57/EU on criminal sanctions for market abuse claims proportionality because the intervention is limited to what data *is required for the efficient enforcement of general interests*.[791] Is this statement to be interpreted such that there are no principled arguments against negative intervention in the related fundamental rights of the associated natural persons, such as the rights to private life, personal

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[786] Ibid.

[787] See Reg. (EU) No 345/2013, Articles 3, 12, 13, 14, 19, 23, 24, and 26.

[788] Reg. (EU) No 345/2013, Preambles, [53].

[789] Dir. 2014/95/EU, Preambles, [22].

[790] See SEC/2011/1515 final.

[791] SEC/2011/1217 final, Annex 8.

data and freedom to conduct business? The evaluation of the impact of the measures focused on their efficiency in terms of costs and benefits.

Quantitative analysis was performed on the impact of market abuse on the economy and the costs and benefits for businesses, particularly SMEs. The Staff Working Documents on the Directive on non-financial and diversity information disclosure evaluated the impact on fundamental rights. It did not, however, make references to any articles of CFR. The assessment also evaluated the Directive's impact on fundamental rights to be entirely positive.[792] To the extent that the final legislation still concluded that they respect fundamental rights, these conclusions seem more *declarative* than *descriptive*. They seemed to leave room for efficiency evaluation in future measures or *ex post* evaluation of proportionality.

The issues recognised can be summarised in three points:

(1) When referring to fundamental liberties and rights such as the right to personal life and privacy, the regulation does not specify whether protection of privacy also covers its application in the commercial life sphere, that is, whether it has evaluated the impact of regulation on business secrets.

(2) When referring to fundamental liberties and rights, the regulation does not clearly specify the legal person whose rights are protected.

(3) The question of justified intervention in the legal powers of natural persons remains vague, particularly in terms of proportionality. Principle IV stated that the measures intervening in the fundamental non-market liberties and rights of natural persons must be necessary, proportional and efficient. Based on the adopted regulation and regulatory proposals examined here, the line between justified and unjustified intervention in the fundamental rights of natural persons remains ambiguous.[793] Whether the crisis measures comply with Principle IV remains inconclusive, and the question will be revisited to later .[794] However, studying Principles I–III yields encouraging results. They enable the recognition of at least some of the key variables that have determined the legal powers and legal relations of CEs considered in Chapter 9.

[792] See SWD/2013/0127 final, Annex VII.

[793] See also Cherednychenko 2014, 177.

[794] See below Ch. 10.

8.4 Summary

This chapter aimed to analyse the impact of the secondary legislation adopted by the EU during the financial and economic crisis on the legal powers of corporations. Its objective was to recognise (1) how the legal powers and legal relations of corporate entities were influenced by the measures adopted by the EU to respond to the challenges posed and perpetuated by the financial and economic crisis; (2) how the measures adopted reflect the legal personhood and general principles of the legal governance of corporate entities.

Chapter 8.2 provided an overview of the policy measures adopted in response to the challenges posed and perpetuated by the crisis from the perspective of corporations. It studied the measures taken (1) to respond to the causes of the crisis, (2) to share the costs of the crisis, (3) to distribute benefits created by the market and (4) to promote sustainable business. The study utilises the Hohfeldian typology reviewed and formulated in Chapter 2.2.2 to provide a more profound understanding of the nature of legal changes. Measures taken to respond to the causes of the crisis had perhaps the most significant effect on the legal powers of corporations, particularly those operating in the financial and banking sector. These measures imposed vertical duties on operators in the financial and banking sector to ensure the proper functioning and stability of that sector.

Chapter 8.3 then analysed how the measures adopted reflect the legal personhood and general principles of legal governance of corporate entities formulated in Chapters 5.4 and 6.4. The first principle of legal governance of corporate legal persons outlined how

> Corporate entities may be provided with separate legal personhood limited to the commercial life sphere to enhance economic efficiency and transactions. The legal personhood of a corporate entity may be removed or considered invalid if (a) it does not practise its purpose, i.e., business, or (b) its practices harm the general interests or are contrary to social values.

Even though the financial and economic crisis had an impact on the *ethos* of doing business, drawing attention to social sustainability, Chapter 8.3.1 demonstrated that the crisis measures were consistent with the idea that the purpose of corporate entities is to enhance economic efficiency and transactions. Although some measures constituted negative intervention in the liberties and rights of corporate entities, their emphasis was on ensuring the proper functioning of the markets. The policies adopted demonstrate how corporations as business entities can and should benefit from adopting socially responsible practices.

Chapter 8.3.2 studied Principles II and III, where Principle II recognised that corporate entities enjoy the legal power necessary for their societal purpose. Principle III, on the other hand, recognised how corporate entities may have legal or contractual privileges and corresponding rights provided to support Union objectives or general interests recognised by the Union. The analysis revealed how the measures aiming to support general interests recognised by the Union or protect consumers and posted workers embody the EU's economic objectives.[795] The study concluded that the measures adopted were consistent with the principles outlined. It also revealed the material impact of the evaluation of the efficiency of measures. While there are no principled arguments against intervention in the legal powers of corporate entities, it is clear that there are sound pragmatic arguments for such intervention, even if the objective was to respect and protect human rights.[796]

Although the consistency of the crisis measures with Principle IV remains inconclusive, the study provided some clear indications of how the EU governs corporate entities. The key outcomes of the analysis are (1) that the Union objectives are strongly present in all the measures adopted, (2) that the measures reflect the social role of corporations in doing business and (3) that the evaluation of the efficiency of measures is crucial in determining legal powers and legal relations.

The following chapter will take another look at the measures adopted, focusing on the recognition and systematic presentation of the key variables that have influenced corporations' legal powers and legal relations as autonomous legal entities.

[795] See above Ch. 8.3.2.1.

[796] See above Ch. 8.3.2.2.

9 RECOGNITION OF KEY VARIABLES

This chapter aims to identify the key judicial and extrajudicial variables that determine the legal powers and legal relations of corporate entities as autonomous legal persons in the EU. Firstly, Chapter 9.2 studies how the crisis measures reflect changes in the perceived legitimacy and efficacy of the pre-crisis regulatory framework. It recognises how the measures adopted aimed at a fair sharing of the costs of the crisis and benefits created by the markets and responded to increased demand for more socially sustainable business. The measures adopted also reflect changes in the perceived efficacy of EU law in achieving economic growth, price stability and social market. Chapter 9.3 then aims to identify the key judicial and extrajudicial variables determining the legal powers of corporate entities. While the United Nations Guiding Principles on Business and Human Rights as judicial variables triggered measures promoting socially sustainable business, most of the changes in corporate legal power are traceable to changes in extrajudicial variables, such as changed economic conditions and their impact on the costs and benefits created by business activities. In comparison to judicial factors, extrajudicial variables have been carefully assessed and balanced, which highlights their significance in determining the legal powers and legal relations of corporate entities.

9.1 Introduction

Crisis constitutes a challenging situation for society on many levels. It may question existing values, beliefs and ideas about the structures of society, whether social, political or economic. As such, periods of crisis may change societal relations, including legal relations. For example, the financial and economic crisis 2008−2014, presumably caused by the risk-seeking behaviour of business in the existing regulatory environment, resulted in the deepest economic recession since World War II. Preceding chapters have analysed the impact of the regulation adopted in the European Union during the crisis period. They have recognised the impact of crisis measures on the legal powers and legal relations of corporate entities acting both inside and outside the financial sector. This chapter aims to identify the key variables that have determined the legal powers and legal relations of corporate entities, highlighting relevant aspects from the previous chapters of this study. While a more thorough investigation into the preparatory legislative work and material would be required for conclusive results, the assumption is that key judicial and extrajudicial

variables are sufficiently recognisable in the key policy documents, particularly the regulatory proposals.

Firstly, this chapter studies whether changes in the legal powers and legal relations of corporations reflect changes in the *realm of legitimacy* and *realm of efficacy*. As Chapter 3.1.2 described, societal values, beliefs and ideas about the legitimacy and efficacy of measures frame the possible measures the legislator can adopt. It enumerated social values and beliefs about ethics and morality as static principles outlining the realm of possibility in terms of legitimacy. Chapter 3.1.2 also recognised ideas and beliefs about proper means to ends as dynamic principles that describe the realm of efficacy.

Firstly, Chapter 9.2 aims to recognise the *changes in the perceived legitimacy and efficacy of the EU legal system regarding the legal governance of corporations underlying the regulatory measures adopted*. Secondly, Chapter 9.3 aims to identify *the key variables that determine the legal powers and legal relations of corporate entities as autonomous legal persons* in the EU. The variables divide into *judicial* and *extrajudicial variables*. Judicial variables are those that depend on legislative and judicial proceedings. They are changes in the legal obligations of the EU occurring either through new regulation or interpretation of them. Hence, judicial variables refers to changes in the *legal world*: the Union's legal duties.

On the other hand, extrajudicial variables refers to changes in the *real world*, such as social, political, economic or environmental circumstances. Considering the teleological nature of EU law recognised in Chapter 3.2, target standards inwritten into the law acts as an intermediary for the extrajudicial changes. For example, Article 3 TEU provides targets such as free movement, internal market, balanced economic growth, price stability, a highly competitive social market economy and a high level of protection and improvement of the quality of the environment. These target standards are legal norms responsive to changes in the real world: Although used as the legal basis for changes in corporate legal powers and legal relations, the underlying variables are extrajudicial. Internal market law, competition law, environmental law and financial regulation, among others, constitute intermediaries for extrajudicial changes in the conditions for achieving Union objectives. Chapter 9.3 aims to identify the key judicial and extrajudicial variables and contemplate their relationship with the changes in perceived legitimacy and efficacy of corporate legal governance in the EU. Finally, Chapter 9.4 will summarise the results.

9.2 Between Legitimacy & Efficacy

9.2.1 Changes in the Realm of Legitimacy

Chapter 3.2.1 described how, considering all the possible measures of legal governance public power can take, the realm of legitimacy rules out those measures that are not consistent with fundamental social values and beliefs. Social values and beliefs may also necessitate measures to be adopted either to respond to an emerging legitimacy deficit or to correct a pre-existing deficit. If regulation is adopted or upheld contrary to fundamental social values and beliefs, the legal system risks a crisis of legitimacy. Although this research has labelled these fundamental principles *static,* the ethical and moral beliefs themselves also change in the long run, in which case the legal system needs to conform to these changes to avoid a legitimacy crisis. Also, crises can influence, if not perhaps the beliefs themselves, their current relevance for the legitimacy of the legal system. The assumption here is that crises can change perceptions about the legitimacy of legal systems and other social institutions without changing fundamental values and beliefs.

This chapter studies the changes in the perceived legitimacy of the EU legal system as reflected by the regulatory measures studied herein. It considers whether and to what extent the changes in the legal powers and legal relations of corporate entities respond to changes in the perceived legitimacy. As previous chapters have described, the financial and economic crisis raised issues about the legitimacy of the economic governance in Europe. Commissioner László Andor perfectly encapsulated this in 2011 by stating how

> [v]alues like solidarity, sustainability, inclusiveness and integrity are not always upheld by business and I believe our economies have suffered as a result.[797]

In the 'renewed EU Strategy 2011−14 for Corporate Social Responsibility', on the other hand, the Commission recognised that there exists

> [t]he need to give greater attention to human rights, which have become a significantly more prominent aspect of CSR.[798]

[797] IP/11/1238, [7].

[798] COM/2011/0681 final, [5].

Indeed, a large part of the regulatory measures described in Chapter 7.2 seems legitimacy relevant – from the measures responding to the causes of the crisis, sharing the costs of the crisis, distributing the benefits created by the market to those promoting socially sustainable business.

Measures adopted to respond to the causes of the crisis and share the costs tackled the issue of 'foot[ing] the bill when banks make mistakes'.[799] The pre-existing regulation failed to share the costs of the crisis fairly. Hence, the measures adopted aimed to *enhance the legitimacy of EU economic governance by ensuring that businesses and individuals bear their fair share of the burden*. For example, the Financial transaction tax aimed to ensure a fair contribution from the financial sector to the costs of the crisis. The fairness of taxation was also frequently referred to when tackling tax evasion.[800] For example, in its proposal for a Council Directive implementing enhanced cooperation in the area of financial transaction tax, the Commission stated how

> [--] the recent global economic and financial crisis had a serious impact on our economies and the public finances. The financial sector has played a major role in causing the economic crisis whilst governments and European citizens at large have borne the cost. There is a strong consensus within Europe and internationally that the financial sector should contribute more fairly given the costs of dealing with the crisis and the current under-taxation of the sector.[801]

Although 'fair' and 'fairness' can refer to 'just', 'proper' or 'right' – terms with strong connotations of substantive justness and social values – it may also refer to 'impartiality' and 'conforming to established rules'.[802] Indeed, the latter definitions have considerably less emphasis on substantial justness and more on procedural justness. Hence, whether this is a question of legitimacy or efficacy will be discussed further in the following chapters.[803]

Measures taken to distribute the benefits created by the market seem to aim at *a fairer distribution of benefits*.[804] For example, the Directive on criminal sanctions for intentional market abuse (2014/57/EU) closely connects with legitimacy, stating how criminal sanctions 'demonstrate a stronger form of social disapproval'. [805]

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[799] MEMO/14/294, 1, [1]. See above Ch. 7.2.2.

[800] See above Ch. 7.2.3.

[801] COM/2013/071 final, 1.1, [1].

[802] Definition by Merriam-Webster. Available at: https://www.merriam-webster.com/dictionary/fair (Accessed on 17th July 2021).

[803] See below Ch. 9.2.2.

[804] See above Ch. 7.2.4.

[805] Dir. 2014/57/EU, Preambles [6].

Furthermore, the measures supporting social enterprises seem to respond to a *legitimacy deficit of how business is done by supporting business actors with broader social, environmental and community objectives.* Also, the protection of posted workers and the involvement of employees in corporate decision-making reflects an attempt to promote the value of *solidarity*.[806]

Of course, legitimacy is evident in measures taken to promote *socially sustainable business*.[807] The EU Structural Funds support 'the development of CSR, especially amongst SMEs, and to partner with companies to better address problems such as poverty and social inclusion'.[808] The measures promoting socially sustainable business also included requirements for businesses that receive EU funding. They need to

> [--] demonstrate that their operations are compliant with environmental, social and fiscal standards, including respect for human and indigenous rights, decent work, good corporate governance and sector-specific norms.[809]

In addition, the Single Market Act of 2011 stipulates how:

> A level playing field must be assured and initiatives, which introduce more fairness in the economy and contribute to the fight against social exclusion should be supported. The tremendous financial lever of the European asset-management industry (EUR 7000 billion in 2009) should be used to promote the development of business which has chosed – above and beyond the legitimate quest for financial gain – to pursue objectives of general interest or relating social, ethical and environmental development'.[810]

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[806] See COM/2010/0608 final, 2.2. in relation to solidarity for posted workers. See COM/2012/007 final, COM/2010/2020 final, COM/2010/0573 final, COM/2008/0800 final on social dialogue and employee-involvement. Social dialogue and the role of the social partners are recognised in the Treaty on the Functioning of the European Union. Article 152 TFEU states that '[t]he Union recognises and promotes the role of the social partners at its level, taking into account the diversity of national systems. It shall facilitate dialogue between the social partners, respecting their autonomy'. The Treaty's employment title embodies the 'open method of coordination' for the European Employment Strategy. (Articles 145–150 TFEU.) The TFEU also contains the legal framework for the European social dialogue. (Articles 154–155 TFEU.) Social dialogue had been encouraged before, in relation to structural reforms, related to changes in the industrial structure and changes in the structure of European demographics, as well as in the area of sustainable production and consumption. (See e.g. COM/2005/0658 final.) See above Ch. 7.2.4.

[807] See above Ch. 7.2.5.

[808] COM/2011/0681 final, 4.7, [1].

[809] COM/2014/263 final, 2.1, Box 1(6).

[810] COM/2011/0206 final, 2.8, [2].

The demand for more socially responsible corporate practices reflects the international development, particularly the United Nations Guiding Principles on Business and Human Rights adopted on 16 June 2011. For example, the Country-by-Country Reporting Mechanism demonstrates the global nature of corporate social responsibility, aiming to increase corporate transparency worldwide. Also, the Public Procurement Directive reform emphasised *ensuring the performance of public contract operators with environmental, social and labour law*, including ILO Treaties.[811] Public procurement criteria may also be used to obligate producers to fulfil specific standards for their products or services concerning their social and economic impact.[812]

Change in the perceived legitimacy of business activities reverberates to the legitimacy of the EU legal system that governs corporate behaviour. The measures adopted reflect societal values, such as *conceptions of fairness* and how *corporations should positively influence society*, not just economically but *socially and environmentally*. These values played a crucial role in establishing the objectives of the crisis measures. However, as Chapter 8.3 recognised, the evaluation of the efficiency of measures played a key role in determining the measures taken to respond to these legitimacy challenges. The following chapter will study how the measures adopted reflect changes in the perceived efficacy of EU law.

9.2.2 Changes in the Realm of Efficacy

Ideas and beliefs about appropriate means to achieve desired objectives create the realm of efficacy.[813] In the European Union, the dynamic principles of the European competitive social market economy describe the realm of efficacy. As Chapter 6.2.2 described, the dynamic principles are (1) pursuing balanced economic growth and protection of price stability, (2) protection of competitive market and (3) steering the economy in a socially acceptable direction by laying down common rules. These principles are embedded in the EU law in the form of target standards, making the legal system responsive to changes in the perceived efficacy of EU law without necessitating changes in the EU primary legislation and, on occasion, without changes in secondary legislation. Chapter 8 already noted the importance of

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811 Dir. 2014/24/EU, Art. 18(2) & Annex X.

812 See above Chs. 9.2.4 & 9.3 Dir. 2014/24/EU, Preambles, (2), (78). See COM/2011/0682 final, 2, [3] & 3.3.2.

813 See above Ch. 3.1.2.

evaluating the efficiency of measures in terms of costs and benefits. This chapter focuses on the changes in the perceived efficacy of EU law and its impact on the legal powers and legal relations of corporate entities.

Most notably, the financial crisis revealed *a lack of efficacy of the pre-crisis regulatory framework to ensure the stability of the financial and banking sector*. It also revealed changes in the perceived efficacy of national supervision of the financial institutions and taxation.[814] As previously established, a significant part of the 'hard law' regulation that negatively influenced the liberties and rights of corporate entities in the financial and banking sector stemmed from the attempt 'to adopt all necessary legal solutions to avoid repeating the mistakes that occurred'.[815] The European Committee of the Regions recognised in 2015 how 'under-regulating the use of financial instruments is as harmful as over-regulating it'.[816] The efficiency of regulation, hence, means avoiding both under-regulation and overregulation. The Commission communication on 'EU Regulatory Fitness' from 2012 reflects a similar change:

> The economic and financial crisis has revealed costs of non-action, weak legislation and enforcement in some areas. It has prompted a call for strengthened economic governance and financial regulation at EU level.[817]

According to Article 3(3) TEU, the development of Europe is based on balanced economic growth and price stability. The principle of balanced economic growth has steered the pursuit of policy objectives throughout the 21st century. In 2005, President of the Commission, José Manuel Barroso stated:

> Sound macroeconomic conditions are essential to underpin a credible effort to increase potential growth and create jobs. In particular, the continued pursuit of stability-oriented macroeconomic policies and of sound budgetary policies will be crucial. Governments must, whilst maintaining or pursuing sound public finances maximise the contribution to growth and employment.[818]

To ensure balanced economic growth, the Treaty on the Functioning of the European Union laid down rules of budgetary discipline for the Member States. It also established rules of operations for the European System of Central Banks

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[814] See above Chs. 7.2.2 & 7.2.3. See also Article 65 TFEU.

[815] 2015/C 423/07, para. 13.

[816] Ibid., para. 8.

[817] COM/2012/0746 final, 1, [1]. See also SWD/2012/0422 final; SWD/2012/0423 final.

[818] COM/2005/0024 final, Foreword, [26]. The conditions of stable economic growth and macroeconomic policies were at the centre of attention in the sovereign debt crisis, see above Ch. 2.2.2.

(ESCB) and the European Central Bank (ECB), whose primary objective is to ensure price stability.[819] In an economic recession, this budgetary discipline means that the Member States have limited capacity to implement expansionary economic policies in an economic downturn, meaning that the Member States cannot rely on increasing economic activity through government expenditure.[820]

The separation of monetary and financial policy, on the other hand, means that the Member States have no power to increase the money supply to activate the economy. In the European Monetary Union, the ECBS may adopt accommodative monetary policies during an economic downturn. However, the primary objective of the ECBS is to guarantee price stability. This objective limits the use of monetary stimuli because an increase in money supply could cause inflation, that is, rapidly rising consumer prices. On the other hand, inflation inhibits economic growth in the long run.[821] Therefore, to the extent that the Member States use their limited resources, attention is paid to maximising the positive impact on economic recovery and growth and overall positive social impact.

Indeed, *many of the regulatory measures adopted aim to enhance the efficient and effective use of public resources*. For example, the Commission Proposal for a Public Procurement directive stated how public expenditures on goods, services and building constitute about 18% of the gross national product (GNP) of the European Union. It concluded how

> [g]iven the volume of purchases, public procurement *can be used as a powerful lever for achieving a Single Market fostering smart, sustainable and inclusive growth*.[822]

The Commission Proposal, however, also states how, '[o]f course, addressing societal challenges should not decrease the efficiency of public procurement.'[823] Also, the Commission's Communication on the Reform of the EU State Aid Rules on Services of General Economic Interest stated how

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[819] See above Ch. 6.2.1. See e.g. Articles 126–128; 140 & 282 TFEU.

[820] While the financial and economic crisis, and especially the sovereign debt crisis, influenced the enforcement of budgetary rules and institutional relations, this chapter focuses on measures impacting on the legal powers and legal relations of corporate entities.

[821] In reality, however, the ECBS aims to control inflation rather than ensuring price stability. The ECB's Governing Council adopted in 1998, and verified in 2003, that 'in the pursuit of price stability it aims to maintain inflation rates below, but close to, 2% over the medium term'. (The definition of price stability: https://www.ecb.europa.eu/mopo/strategy/pricestab/html/index.en.html, Accessed on 24 June 2020.)

[822] COM/2011/0896 final, 1, [10]. Emphasis by S.R.

[823] COM/2011/0015 final, 4, [1].

> The overall objective of the reform of the State aid rules for SGEI is to *boost the contribution that SGEI can make to the wider EU economic recovery*. Member States need, in fact, to guarantee certain services at affordable conditions to the general population (e.g. hospitals, education, social services, but also communications, energy or transport). National, regional and local authorities are responsible and enjoy a large discretion in providing, commissioning and organising SGEI. At the same time, however, *an efficient allocation of public resources for SGEI is key to ensuring the competitiveness* of the EU and economic cohesion between the Member States. Efficient and high quality public services support and underpin *growth and jobs across the EU*. Social services, in particular, also help to *mitigate the social impact of the crisis*.[824]

Several measures reflected how the EU sought a way out of the crisis without an extensive burden of debt for public finances.[825] The changes in the regulatory strategy reflect changes in the role of market actors in returning to economic growth, emphasising more the role of small businesses, small investors, and private consumers. In addition, consumer and investor protection pursues a trusting relationship between them and companies, both inside and outside the financial and banking sectors.[826] These measures indicate a *change in the perceived efficacy of strategy relying on large market actors*. Instead of relying on the economic power of fewer major actors, the *new strategy focused on the combined economic power of numerous smaller actors*[827], steered towards common objectives through positive economic incentives and information.[828]

A similar shift seems to have taken place in promoting socially responsible business practices. The European Multi-stakeholder Forum on Corporate Social Responsibility (CSR EMS Forum), set up in 2002 on the proposal of the Commission, included a variety of stakeholders, workers and NGOs, and consumer organisations. However, an industry roundtable, the European Alliance of CSR

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[824] COM/2011/0146 final, 4, [1]. Emphasis by S.R.

[825] This was especially true for the Member States suffering most from the sovereign debt crisis. Some critical research studying the social policies of the EU produced similar results: Economic growth has priority over social cohesion and welfare. (See e.g. Porte & Heins 2015; Lammers, van Gerven-Haanpää & Treib 2018; Pye 2017. In relation to the sovereign debt crisis and the subsequent budgetary austerity, this insertion has been referred to by Wolfgang Streeck (2015) as 'the rise of the European Consolidation State'. Austerity is practised despite its negative impact on economic growth and recovery from the crisis, to show the private lending markets that the State is a reliable debtor, prioritising repayment. The foremost duty of the State is toward the creditors, or *Marktvolk*, not to its citizens, or *Staatsvolk*. (Steeck 2015, 11. See also Adams, Fabbrini & Larouche 2017, 3; Craig 2016, 25–26.)

[826] See above Ch. 8.3.2. See also COM/2010/0348 final; COM/2010/301 final; COM/2012/0280 final.

[827] These actors being also geographically more local and immobile.

[828] See above Ch. 7.3.

established in 2006, effectually replaced the EMS Forum.[829] The pre-crisis strategy for corporate social responsibility relied on cooperation between large actors. The industry-oriented focus on CSR reflected an idea that allocating financial support for CSR to large businesses would *trickle down* through the subcontracting chain and influence the entire industry.[830] However, the crisis seemed to expose the inefficiency of this strategy, which was then replaced by a strategy recognising the role of smaller market actors, such as SMEs, social businesses, consumers and investors. As a result, *the top-to-bottom trickle-down effect of changing industrial practices proved insufficient and was complemented with a bottom-up approach*.

The shift was not paradigmatic as the strategy still relies significantly on market mechanisms, but it is different from the pre-crisis approach. It reflected *changes in perceived efficacy and ideas in the costs and benefits of regulation*, including costs and benefits for the businesses themselves. For example, the Commission estimated that the measures taken to enhance the position of consumers and support socially responsible business *would not create not only compliance costs but also benefits for businesses*:

> By addressing their social responsibility enterprises can build long-term employee, consumer and citizen trust as a basis for sustainable business models. Higher levels of trust in turn help to create an environment in which enterprises can innovate and grow.[831]

Nevertheless, the crisis measures reflect a change where the focus is increasingly on smaller businesses and other market actors, such as consumers and small investors and how they benefit from the market system and create added value.[832]

Related to the position of consumers and SMEs in the market, the crisis measures aimed to enhance market competition and tackle market abuse.[833] The measures adopted aimed to increase the efficient enforcement of competition by lowering the SMEs threshold to access the internal market and providing national authorities with more investigative and sanctioning powers to detect and sanction market abuse.[834] 'A Small Business Act for Europe' adopted in 2008 outlined measures to reduce the administrative burden of small and medium-sized enterprises and facilitate their

[829] See De Schutter 2008.

[830] See COM/2002/0347 final.

[831] COM/2011/0681 final, 1.1, [3].

[832] See above Ch. 7.2.4.

[833] Ibid.

[834] Ibid.

access to finance, which resulted in the establishment of EuVECA in 2013.[835] On the other hand, the Market Abuse Regulation (EU) 596/2014 strengthened administrative sanctions and strengthened the investigative powers of national authorities to detect abuses on financial markets.[836]

The economic crisis also seemed to raise the question of consumer benefit. Earlier research has recognised how the General Directorate of Competition (GDC) did not consider benefits created for consumers for a significant part of the Union's history. Instead, it considered all contracts preventing, restricting or distorting competition to be unlawful.[837] Thus, it was the competitors and not the consumers whose wishes were the 'goal of the market game'.[838] The Court was first forthcoming in incorporating the benefits of the consumers into the interpretation of competition law.[839] The first signs of changing policies came in April 1999, when the European Commission adopted a White Paper on modernising the competition rules.[840] This White Paper aligned the competition policy towards a more economic-based evaluation of competition rules.[841]

In 2004, the European Commission published guidelines for the application of Article 101(3) TFEU. There it outlined how

> qualitative efficiencies such as new and improved products, creating sufficient value for consumers may compensate for the anti-competitive effects of the agreement, including a price increase.[842]

This effect-based approach became predominant in the following years, and the challenges posed and perpetuated by the economic crisis further underlined the need to increase consumer confidence by enhancing consumer protection and tackling market abuse.[843]

The crisis measures enhancing the position of small investors, small businesses, and individual consumers reflect a perceived inefficacy of competition law. Arguably, the pre-crisis regulatory framework failed to utilise the growth potential of SMEs, to

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[835] COM/2008/0394 final. See above Chs. 7.2.4 & 8.2.3. See also Reg. (EU) No 345/2013.

[836] See above Chs. 7.2.2 & 8.2.1.

[837] See Maher 2011, 726.

[838] Chiriţă 2014, 270.

[839] Craig & de Búrca 2015, 1053; 1019; and the cases mentioned therein.

[840] COM/1999/101.

[841] See Gerbrandy 2019.

[842] 2004/C 101/08, [13]; [24]; [102].

[843] See above Ch. 7.2.4.

encourage positive consumer spending, or to encourage investments during an economic crisis when the market power of smaller but numerous actors was essential to economic recovery and growth. The crisis emphasised the role of private consumption for economic recovery but simultaneously damaged consumer confidence. Hence, the crisis provided additional incentives for the regulatory trends discernible since the 2000s. While in speeches, the criminal sanctions for market abuse were considered to 'demonstrate a stronger form of social disapproval', the perceived changes also positively influenced the achievement of economic growth.[844]

As Chapters 7 and 8 already recognised, the measures adopted during the period 2008−2014, and in early 2015, did not constitute a paradigmatic change in the legal governance of corporate entities. Indeed, while there have been regulatory changes resulting from changes in the perceived efficacy of the EU law, they are consistent with the dynamic principles of the European competitive social market economy. The key ideas and beliefs have remained the same, but as these ideas are, as the name suggests, dynamic, they can accommodate regulatory measures from a broad spectrum.[845] Indeed, the crisis measures reflect how the target standards embedded in Treaty law are highly responsive to changes in external circumstances. Accordingly, the following chapter studies the role of judicial and extrajudicial variables on the legal governance of corporate entities during the financial and economic crisis.

9.3 Between Judicial & Extrajudicial Variables

9.3.1 Judicial Variables

Judicial variables consist of norms binding the EU legislator, including Treaty law, interinstitutional agreements, and bilateral and multilateral treaties. Indirectly, judicial variables also include the international obligations of Member States. Therefore, changes in judicial variables may be the result of changes in these norms or their interpretation. Thus, while the crisis measures themselves were adopted by the EU legislator, this chapter studies whether the measures adopted reflect changes in the legal obligations of the EU.

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[844] See above Chs. 7.2.4 & 8.3.2.

[845] See above Ch. 3.2.1.

Changes in judicial variables, such as the international obligations of the EU, may correspond to changes in the realm of legitimacy considered above. However, they may also relate to changes in the perceived efficacy of EU law, especially if there have been changes in the EU Treaty norms.[846]

This research finds that the most recognisable change in the judicial variables is the *adoption of the United Nation's Guiding Principles on Business and Human Rights*. Although these principles did not create legal obligations for the EU or its Member States, they have influenced the development of corporate legal powers and legal relations. The UNPGs

> seek to provide an authoritative global standard for preventing and addressing the risk of adverse human rights impacts linked to business activity.[847]

Arguably, they prompted the adoption of the Country-by-Country Report Mechanism, increasing the transparency and accountability of multinational corporations and corporations acting in the extractive and forest industries.

The role of conventions and agreements adopted by the United Nations has also been recognised in the amended public procurement directive:

> When implementing this Directive, the United Nations Convention on the Rights of Persons with Disabilities should be taken into account, in particular in connection with the choice of means of communications, technical specifications, award criteria and contract performance conditions.[848]

And,

> Furthermore, the feasibility of establishing a common methodology on social life cycle costing should be examined, taking into account existing methodologies such as the Guidelines for Social Life Cycle Assessment of Products adopted within the framework of the United Nations Environment Programme.[849]

As Chapter 8.2.4 argued, the adoption of CBCR and the public procurement directive did not create new *de jure* horizontal legal duties for corporate entities. Nevertheless, the international standards set by the United Nations influenced the

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[846] Studying the impact of the sovereign debt crisis on institutional powers and institutional relations could provide a possible example of changes in the judicial variables closely connected to changes in the perceived efficacy of the European competitive social market system.

[847] Guiding Principles on Business and Human Rights: https://www.unglobalcompact.org/library/2 (Accessed on 6 September 2016).

[848] Dir. 2014/24/EU, Preambles, (3).

[849] Ibid, at (96).

legal powers of CEs in vertical legal relations and contractual market relations, which, on the other hand, reflect the changes in the realm of legitimacy discussed in Chapter 9.2.1. However, an interesting observation is how the Commission proposal for a public procurement directive of 2011 did included no references to the United Nations even though the United Nations Convention on the Rights of Persons with Disabilities had entered into force on 3 May 2008 and the Guidelines for the Social Life Cycle Assessment of Products in 2009.[850] The example demonstrates how, in the framework of the European Union, the EU is the primary source of standards. While other legislative institutions and the Member States act as intermediary institutions for international standards, these standards seemed to have played a limited role in determining the legal powers and legal relations of corporate entities.[851] The following chapter on extrajudicial variables continues from here.

Although binding norms such as the rights of consumers[852] and employees have been used to justify negative intervention in the liberties and rights of corporate entities, these changes do not stem from changes in the legal obligations of the EU. No relevant changes in the Treaty norm or EU Charter of Fundamental Rights, nor changes in the ECJ interpretation of EU primary legislation, which would have necessitated the establishment of higher standards through secondary legislation, have taken place.

The limited impact of judicial variables is also reflected in the lack of balancing between conflicting rights, recognised in Chapter 8.3.3. Even when the measures constituted a negative intervention in the liberties and rights of corporate entities, judicial balancing between the solidarity market rights of employees and consumers and the fundamental market liberties and rights of corporations is missing. Instead, the reasons for reforming labour and consumer protection seems to stem from extrajudicial variables, such as policy objectives. The Commission Staff Working Document on Restructuring in Europe from 2011 aptly demonstrated this interconnection of employee rights and broader societal objectives:

> As during the crisis, social dialogue should continue to constitute a crucial tool for dealing with employment, skills and, in general, adaptation issues. Social dialogue demonstrated, throughout the crisis, that it *encouraged the adaptation of companies to difficult situations*. These included development of innovative instruments (such as short-time work, and variation of employment conditions in accordance with production needs and market demand, etc.), as well as by more fundamental restructuring.

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[850] See COM/2011/0896 final.

[851] See above Ch. 8.3.2.

[852] Articles 169(1) and 169(2)(a) TFEU and Article 38 CFR.

> At company level, this means that *necessary restructuring cannot be resisted but in order to minimise its social impact* good practices in this field should be disseminated and promoted while paying attention to the specifics of individual national industrial relations system and of economic and social contexts.[853]

As Chapters 8.2.3 and 8.2.4 above recognised, the interests of employees and consumers as holders of rights recognised in the EU Charter of Fundamental Rights were strengthened side-by-side with the rights of passive and minority shareholders who do not enjoy such rights. This approach is also illustrated in the Commission Staff Working Document on Restructuring in Europe:

> The procedure of carrying out a cross-border merger is developed to protect the rights and interests of shareholders, creditors and employees.[854]

The judicial changes in the standards of employee rights and consumer protection studied were endogenous and strongly influenced by extrajudicial variables considered in the following chapter.

Summa summarum, the adoption of the UN Guiding Principles on Business and Human Rights was an influential judicial variable. However, as the analysis in Chapters 8.2.4 and 8.3.2 argued, the UNPGs had only a limited direct impact on the horizontal legal relations of corporations outside contractual market relations. Thus, while the adoption of the UNPGs coincides with the measures adopted on the EU level, probably they were not the *primus motor* for promoting socially sustainable business. Instead, the measures adopted by the European Union to promote socially sustainable business were responses to the social challenges posed and perpetuated by the crisis and responsive to changes in extrajudicial variables.

9.3.2 Extrajudicial Variables

Extrajudicial variables are real-world variables instead of the judicial variables of the legal world. They include socio-cultural, political, economic and environmental variables. Changes in extrajudicial variables influence both the legitimacy and efficacy of regulation and may trigger a regulatory response, i.e., legislative changes aiming to enhance the efficacy of regulation. This chapter aims to recognise key extrajudicial

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853 SEC/2012/0059 final, 73.

854 Ibid., 192.

variables inthe legislation, legislative proposals and working documents studied for this research.[855]

As Chapter 9.2.1 described, the financial and economic crisis caused changes in the perceived legitimacy of EU law. Changes in the perceived legitimacy can be traced to changes in the extrajudicial conditions, such as socio-cultural changes caused and magnified by the economic and social impacts of the crisis. For example, the crisis measures reflect changes in the perceived fairness of the established rules regarding the division of costs of the crisis and benefits created by the market. As Chapter 9.2.1 discussed, these measures referred to concepts with connotations of legitimacy, such as 'fairness'. However, to some extent, it seems that the term 'fairness' refers to 'impartiality' and 'conforming to established rules', rather than 'proper' or 'just'[856], as the objectives of the measures were in many cases to attain economic objectives, such as competition or growth in a changed financial and economic situation.

Indeed, for the most part, the measures adopted echo changes in the perceived efficacy of regulation. The extrajudicial factors that had rendered the pre-existing regulation insufficient to ensure the stability of the financial and banking sector can be seen to include *the globalisation of the financial and banking sector* and the subsequent cross-border impacts of financial sector volatility. Critical from the EU perspective was the *increased interdependence of the eurozone States*, which had an unexpected and unprecedented 'shock effect' across Europe. The regulation had fallen behind these extrajudicial transitions and could not impose adequate control over the financial and banking sector. As a result, *ad hoc* solutions to prevent the collapse of financial and banking institutions were adopted while simultaneously building a more efficient regulatory framework.

The measures adopted aimed to ensure a return to economic growth in an economic downturn. Hence, *the regulation responded to changes in the conditions for economic growth*, including measures related to rights protected in the CFR. The first example: While enhancing workers' rights, the crisis measures allowed companies to make thet structural adjustments necessary in the changing economic circumstances, including

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[855] The study provided herein is not conclusive. A more comprehensive study would require different methods and materials, such as studying the preparatory legal work and processes. Therefore, this chapter *proposes* key extrajudicial variables as possible explanatory factors rather than *claiming their validity*. Further research is required to confirm the findings. Nevertheless, the chapter does provide starting points for further discussion.

[856] Definition by Merriam-Webster. Available at: https://www.merriam-webster.com/dictionary/fair (Accessed on 17th July 2021).

easier layoffs and dismissals.[857] A second example: The return to economic growth while simultaneously responding to the growing demand for public social and health services required 'extracting the maximum from scarce public budgets'.[858] As Chapter 9.2.2 described, the Commission Proposal for a public procurement directive states how public expenditures concerning goods, services and building constitute about 18% of the gross national product of the European Union. The proposal concluded how:

> Given the volume of purchases, public procurement can be used as a powerful lever for achieving a Single Market fostering smart, sustainable and inclusive growth.[859]

The foregoing demonstrates how changes in the extrajudicial conditions of economic growth and demand for public services triggered judicial norms even when they were relevant from the perspective of fundamental non-market rights of natural persons.

The impact of the financial and economic crisis on government revenue and expenditure was also reflected in the measures taken in the field of tax regulation. As Chapter 7.2.3 briefly described, the pre-crisis strategy of tax regulation focused on eliminating double taxation, while the measures adopted during the crisis period emphasised tackling tax evasion, recognising the significant impact of the crisis on the Member States' budgets.[860] In addition, as described above, the Union adopted several measures to compensate for the public-sector deficit created by the financial and economic crisis costs. These included establishing financial transaction tax (FTT) and adopting measures to tackle tax evasion.

However, the parallel objective of tackling tax evasion was related to enhancing competition. For example, the Commission's press release of 2014 described how the enforcement of the duty to pay taxes guarantees 'a level playing field' between businesses.[861] In addition, Algirdas Šemeta, Commissioner for Taxation, highlighted how the various purposes of measures aimed at redistributing tax burden:

> Fair tax competition is fundamental for a healthy Single Market and our common economic prosperity. As we work together to restore growth and competitiveness, it

[857] See e.g. COM/2012/007 final; COM/2010/0573 final; COM/2008/0800 final

[858] COM/2013/0257 final, 5.

[859] COM/2011/0896 final, 1, [10].

[860] See above Ch. 7.2.4

[861] IP/14/663, Background, [1].

> is essential to tackle the harmful tax practices which erode the tax bases of EU Member States. Fair play in taxation must be the rule.[862]

The measures adopted also reflect *changes in the conditions for competition*. The tax investigation focusing on major multinational market players, such as *Apple, Starbucks, Fiat, Amazon* and *McDonald's,* seems to support this conclusion.[863]

The importance of extrajudicial variables in evaluating the measures adopted *supports the conclusion that these measures were responses to changes in extrajudicial conditions*. While introducing a financial transaction tax to cover the costs of the crisis, the Commission recognised that, due to the overall positive impact in the long run, the costs of FTT for business would be marginal at most:

> Taking into account the mitigating measures provided by the design features of the FTT actually proposed, the negative impact on the GDP level in the long run is expected to be limited to around 0.5 % as compared to baseline scenarios.[864]

Also, in several other cases where legal duties were established for businesses, the argument was that the legislation benefits business. For example, the Directive 2014/65/EU on the markets in financial instrument argues how the criteria and process of prudential assessment of financial institutions provide 'legal certainty, clarity and predictability with regard to the assessment process, as well as to the result thereof'.[865] Furthermore, excluding small businesses from the scope of the CBCR ensures that excess administrative costs do not hamper their potential positive contribution to the competition.

The same logic applies to the relationship between companies and their employees. In its Green Paper on 'Restructuring and anticipation of change: what lessons from recent experience?', the Commission outlined the relationship of human resource management and competitiveness of the company:

> It has been shown that, through its human and psychological consequences, poorly managed restructuring can have a significant negative longterm impact on the human resources of companies, thereby weakening this key resource for competitiveness. Companies and social partners from some sectors undergoing particularly strong change have therefore agreed on guidelines to manage mental health issues at workplaces and are increasingly engaged in managing these challenges.[866]

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[862] IP/14/1105, [2].

[863] See above Chs. 7.2.3 & 8.2.2.

[864] COM/2011/0594 final, at 2.2, [9].

[865] Directive 2014/65/EU, Preambles, (47).

[866] COM/2012/007 final, 17

The close presence of policy objectives such as economic growth and competition also *supports the argument that the measures adopted are responses to changes in external conditions* influencing the achievement of these objectives. It is not a matter of changes in the perceived efficacy of legislation but, instead, *of the recognition of actual regulatory failure brought about by changes in extrajudicial factors*. For example, while 'Value Added Tax constitutes a major source of revenue for the national budgets and reform of the current EU VAT system should [--] contribute to fiscal consolidation and growth'.[867]

Concerning the evaluation of tax rulings allocating businesses lower tax rates than usual, the question is not just about the Member States nor EU budgets but about *unfair advantage undermining competition*. Tax rulings 'may give the company a more favourable treatment than what other companies would normally get under the country's tax rules, and this could constitute State aid.'[868] The same applies to actual transfers of public resources. For example, while the new SGEI package provided the Member States with clearer and more flexible rules on the production of these services, the Commission aimed to 'ensure companies entrusted with services of general interest do not get overcompensated, which safeguards competing activity and jobs, and guarantees an efficient use of scarce public resources'.[869]

It also seems that *the financial and economic crisis changed economic growth and development conditions that had previously relied on big business and public funds*. It *highlighted the role of small but numerous market actors* such as SMEs, consumers and workers.[870] As explained by the Commission in the European Consumer Agenda from 2012:

> Empowering consumers means providing a robust framework of principles and tools that enable them to drive a smart, sustainable and inclusive economy. Empowered consumers who can rely on a robust framework ensuring their safety, information, education, rights, means of redress and enforcement, can actively participate in the market and make it work for them by exercising their power of choice and by having their rights properly enforced.[871]

Local small and medium-sized operators have been excluded from the obligations to not to *weaken their competitiveness and potential positive impact on economic growth*, which is possible because of the pragmatic interpretation of the market right to equal treatment. The pragmatic interpretation of the equality principles allows the separation of regulatory obligations based on economic power, operating sector and

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867 PRESS RELEASE 9733/12. See also 2013/C 258 E/07, Preambles, [1].

868 STATEMENT/14/1480, [1].

869 IP/11/1571, [2].

870 Ch. 9.2.2.

871 COM/2012/0225 final, para. 1, [5]. See also COM/2010/0301 final; 2010/2011 (INI)

the nature of the activity, enabling the positive discrimination of smaller market operators, as Chapter 6.3.3 described.

All in all, the assessment of costs and benefits has formed an essential part of the preparatory legislative work while balancing between judicial factors such as fundamental rights has been very limited.[872] Therefore, the extrajudicial variables have arguably determined the development of legal powers and legal relations of corporate entities during the financial and economic crisis.

9.4 Summary

The crisis period was societally challenging and raised important issues concerning the legitimacy and efficiency of the pre-crisis regulatory framework. The study of the measures adopted between 2008 and 2014, and in early 2015 in response to the challenges posed and perpetuated by the financial and economic crisis demonstrated how the regulatory changes reflect changes in the conditions and conception of legal governance. This chapter aimed to identify key variables that determined the development of corporate legal powers and legal relations during the period considered. While further research into the preparatory work and materials, such as impact assessments, would be required for more conclusive results, this chapter has succeeded in identifying some judicial and extrajudicial variables that have played a part in the evolution of corporate legal powers.

Chapter 9.2.1 aimed to recognise the impact of changes in the perceived legitimacy to the legal governance of corporate entities. It worked onthe assumptions that crises can influence the legitimacy of the legal system either by changing the fundamental social values and belief systems or changing our perceptions about the consistency of the legal system with these fundamental values and beliefs. Indeed, Chapter 9.2.1 recognised how the crisis measures reflect changes in the perceived fairness of the legal system. Accordingly, they aim to enhance this legitimacy by fairly sharing both the costs of the crisis and the benefits created by the market. The measures also responded to the legitimacy deficit by supporting business actors with broader social, environmental and community objectives, promoting solidarity and socially sustainable business practices.

However, as previously established, the evaluation of the efficiency of measures played a key role in determining the measures adopted. Therefore, Chapter 9.2.2 studied more closely how the measures adopted reflect changes in the perceived

[872] See above Ch. 8.3.3.

efficacy of the EU law. It recognised how the measures adopted responded to the lack of efficacy of the pre-crisis regulatory framework to ensure the stability of the financial and banking sector and how many of the regulatory measures adopted aim to enhance the efficient and effective use of public resources. In addition, Chapter 9.2.2 indicated a change in the perceived efficacy of a growth strategy relying on large market actors as the post-crisis strategy focused on mobilising the combined economic power of numerous smaller actors to recover from the crisis. Finally, it identified changes in the perceived efficacy of regulation, particularly in terms of regulatory costs and benefits, recognising that regulation can also create compliance benefits for businesses in addition to compliance costs.

After Chapter 9.2. recognising changes in the realm of legitimacy and efficacy that have triggered regulatory responses, Chapter 9.3 aimed to amswer the final research question by identifying key judicial and extrajudicial variables that have come to determine the legal powers and legal relations of corporate entities. Chapter 9.3.1 considered judicial variables and whether the measures adopted responded to changes in the legal norms binding on the European Union or the interpretation of these norms. It recognised that the United Nation's Guiding Principles on Business and Human Rights (2011) played a part in adopting measures aiming to enhance corporate transparency and accountability. However, the presence of many parallel objectives, including the economic objectives of the EU, demonstrates that the reasons for promoting socially sustainable business practices stemmed from changes in extrajudicial conditions.

Indeed, Chapter 9.3.2 aimed to identify socio-cultural, political, economic and environmental variables. These variables included the globalisation of the financial and banking sector impacting the stability of the banking and financial sector and the multiple ways in which the financial and economic crisis changed the conditions for economic growth and competition the legal powers and legal relations of corporate entities. These extrajudicial variables influencing the achievement of economic objectives such as stability, growth and the economic well-being of Europeans seem to have determined the measures adopted, including the extent and limits of regulatory intervention on the liberties and rights of corporations as autonomous entities. While balancing between judicial variables such as competing and conflicting liberties and rights appeared limited, the balancing between costs and benefits has formed an essential part of the evaluation process.[873]

However, more thorough research on the preliminary legislative work, such as the impact assessment process, would be required for more conclusive results. Also,

[873] See above Chs. 9.3 & 8.3.3.

a more long-term search covering both 'on-crisis' and 'off-crisis' periods would provide valid data on the legal governance of corporate entities in the European Union, including court practices. Nevertheless, the following chapter will briefly discuss the relation of these results with the pre-crisis and post-crisis legal governance of corporate entities in the European Union.[874] Hereupon, the research reverts to its starting point: On the legal personhood of corporate entities in the European Union and its implications on the legal powers and legal relations of corporate entities as autonomous legal persons.[875]

[874] See below Ch. 10.2.

[875] See below Ch. 10.3.

PART IV DISCUSSION & CONCLUSIONS

10 DISCUSSION

This chapter discusses the results of this research, connecting them with findings in the earlier research reviewed in Chapter 2. Chapter 10.2 briefly discusses the relation of regulatory trends observed between 2008 and 2014 to more long-term changes recognised in earlier research before the financial and economic crisis. It also observed regulatory trends that have taken place after the financial and economic crisis, including the governance of the COVID-19 crisis. Furthermore, while the research at hand has focused on statutory law, Chapter 10.2 will also briefly discuss the impact of three milestone judgements adopted by the CJEU in 2014 and 2015, considering their impact on the legal governance of corporate entities during the post-crisis period. Finally, Chapter 10.2 will discuss the role of the dynamic principles of the European competitive social market economy, embedded in the primary legislation, recognising their almost static position stemming from the general principles of European Union law and principles of international law. Chapter 10.3 summarises the theory of corporate legal personhood and its limitations, reflecting on earlier research. Finally, Chapter 10.4 will discuss the contribution of the research to the coherence of the legal system and propose avenues for future research.

10.1 Introduction

As this study on corporate legal personhood and legal governance in the European Union draws to a close, this chapter connects the observations made in this research with those of earlier research on legal governance of corporate entities in the European Union. It will also summarise the theory of corporate legal personhood provided to fill a research gap identified in Chapter 1.2 and discuss the contribution of corporate legal personhood to their legal powers and legal relations.

Chapter 10.2 will briefly discuss the relation of regulatory trends observed between 2008 and 2014 to more long-term changes recognised in earlier research before the financial and economic crisis. It also discusses the similarities and differences in the regulatory strategy after the crisis, including responses to the COVID-19 crisis. Chapter 10.2 will also briefly discuss the impact of three milestone judgements adopted by the CJEU in 2014 and 2015, summarising the key points of cases *Maximillian Schrems v Data Protection Commissioner, Google Spain* and *Digital Rights Ireland* and consider their impact on the legal governance of corporate entities during the post-crisis period. Finally, Chapter 10.2 will discuss the role of the dynamic

principles of the European competitive social market economy in the legal governance of corporate entities.

Chapter 10.3 reverts to the normative question of the nature of corporations as legal entities, providing a summary of the theory of corporate legal personhood developed therein. It will also discuss the contribution of this theory to the legal governance of corporate entities, particularly the extent and limits of their legal powers and legal duties. Finally, Chapter 10.4 will discuss the contribution of the research while recognising its limitations and proposing avenues for future research.

10.2 Legal Governance in the EU: Trends & Observations

10.2.1 The EU's Regulatory Pendulum?

The EU's regulatory policies pre-crisis had their fair share of dynamics. The interpretation and enforcement of key principles, such as competition, have changed over time. Even the principle of competition has gone through changes. *Anca C. Chiriță* has described how the Robert Schuman Declaration of 9 May 1950 integrated competition goals into an international dimension of the fight against pernicious cartels and exploitation of markets.[876] During the era of the coal and steel community, the focus was on coal competition – ensuring supply and enhancing price elasticity.[877]

> This brief account of the huge role of the High Authority clearly demonstrates that some of the emerging goals of competition law were rooted in economics: competition as a game of supply and demand servicing consumers and their freedom of choice. With unfair competition, including the protection afforded to producers, this image reflects a total welfare standard.[878]

The recognition of consumer interests in competition law increased during the 2000s. In 2004, the European Commission published guidelines for applying Article 101(3) TFEU, where it outlined how

[876] Chiriță 2014, 285.

[877] Ibid., 288

[878] Ibid.

> qualitative efficiencies such as new and improved products, creating sufficient value for consumers may compensate for the anti-competitive effects the agreement, including a price increase.[879]

This effect-based approach became decisive in the following years, although it has not been consistent. The financial and economic crisis seemed to provide new impetus for consumer protection.[880]

The regulatory strategy described in Chapter 7, focusing on the sufficient distribution of the benefits created by the competition for consumers, occurred within the same legal framework in which the previous measures were adopted. The post-crisis regulatory strategy also reflects the dynamic nature of EU law. The European Commission, acting under the Presidency of Jean-Claude Juncker, decided to focus on the effectiveness of regulation and creating added value for Europeans.[881] In the EU agenda for better regulation, the Commission stated how

> We will continue as we have started: focusing on the things that really do need to be done by the EU and making sure they are done well. Applying the principles of better regulation will ensure that measures are evidence-based, well designed and deliver tangible and sustainable benefits for citizens, business and society as a whole.[882]

During the financial and economic crisis, the question was whether the Union could deliver sufficient regulation that, paraphrasing, aimed to bring unruly businesses in line. However, the passing of the crisis changed the regulatory agenda from 'roll in' to 'roll out', while several measures adopted to respond to the challenges posedby the crisis were still pending. To the extent that new regulation was adopted, it supported business interests. The Commission's Regulatory Fitness and Performance (REFIT) programme has meant the cancellation of some legislative initiatives already in process, including some of the initiatives studied in this research. REFIT also aimed to repeal unnecessary and irrelevant laws, some still pending

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[879] 2004/C 101/08, [13], [24] & [102].

[880] Regarding the prohibition of abuse of dominant market position (Article 102 TFEU), no similar exception rule for the benefit of consumers exists. Hence, while applying Article 102 TFEU, the Court has not considered the benefits created for consumers, but the harm caused to competitors. See Craig & de Búrca 2015, 1071; 1073. Referring to cases C-6/72 *Europemballage Corporation and Continental Can Company v Commission* [1973] ECLI:EU:C:1973:22; C-7/73 *Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation v Commission of the European Communities* [1974] ECLI:EU:C:1974:18. See also Chirita 2014.

[881] *See* COM/2015/0610 final.

[882] COM/2015/0215 final, 1., [5].

enforcement.[883] Business entities were, again, referred to as citizens of the Union.[884] Thus, the dichotomy between business and citizens reflected by previous statements was bridged again.

> The European Commission is determined to change both what the European Union (EU) does, and how it does it. The EU, its institutions, and its body of law, are there to serve citizens and businesses who must see this in their daily lives and operations. We must restore their confidence in our ability to deliver.[885]

Alternative approaches to regulating behaviour accompanied the rolling out of regulation. Behavioural Insight (BI) is used to steer, or nudge[886], individuals to make more rational decisions despite their limited rationality. Behaviour economics uses behavioural biases to steer individuals toward 'rational preferences'.[887] The OECD and World Bank have also endorsed Behavioural Economics. Multiple Member States have already used knowledge of human behaviour when tackling issues such as smoking or encouraging consumers to make healthier or environmentally friendly consumption choices when traditional ideas of price incentives (*i.e.* that raising prices of cigarettes curbs smoking) have proved insufficient.[888] The behaviouralist change is apparent in the Commission's Better Regulation Agenda of 2015.[889] Since 2016, a Foresight and Behavioural Insights Unit has functioned at the Joint Research Centre of the European Commission. Behavioural Insight reflects a continuous process of finding more cost-effective and solutions to strict regulation:

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[883] For example, a growing amount of attention paid to immaterial rights, including strengthening patent rights and trade secrets, is aimed at securing profits. (Dir. (EU) 2016/943; COM/2010/2020 final.) While patentability and copyrights can be seen to diminish competition, the benefits of granting exclusionary rights to the public good justify the high prices. (See Godt 2014, 214.) The objective of creating a single EU Patent Court envisaged in Europe 2020 strategy paves the way for access to justice from a business perspective. Another example is the codification of certain aspects of company law, which aims to identify current rules and abolish restrictions on freedom of establishment. (Dir. (EU) 2017/1132, Preliminaries, (2).)

[884] According to the Commission Proposal, the company law codification aims to make the internal market more accessible to 'citizens'. (COM/2015/0616 final, Explanatory Memorandum, [1].) Simultaneously, the directive specifies that it 'is especially important in relation to public limited liability companies because their activities predominate in the economy of the Member States and frequently extend beyond their national boundaries'. (Dir. (EU) 2017/1132, Preliminaries, (2).)

[885] Ibid., [1].

[886] See Sunstein & Thaler 1998. Richard Thaler was awarded the Nobel Prize in Economics in 2017 for his work in behavioural economy (Source: https://www.nobelprize.org/prizes/economic-sciences/2017/thaler/facts/, accessed on 28th September 2021).

[887] See e.g. Mitchell 2014, 169, 172–177; Baron 2014, 22.

[888] Lourenço, Ciriolo, Almeida & Troussard 2016, 8.

[889] COM/2015/0215 final.

> The understanding of human behaviour is already informing policy-making and contributing to the design of new forms of intervention, as well as complementing traditional approaches (i.e. regulations, incentives, and information requirements). [--] The last few years have seen major developments in the application of BIs to different policy areas.[890]

The regulatory strategy has experienced a significant development. However, in light of existing research, this does not seem unusual for the EU. First of all, the change in the regulatory environment was significant but not paradigmatic. The final objective was to *correct* markets, not replace them.[891] Nevertheless, many of the measures adopted were such that they had not received sufficient support before the crisis and the social challenges it had caused.[892] The difficult period following the financial and economic crisis, and the sovereign debt crisis, has created a legal and financial framework in which the protection of the social rights of citizens may be challenging.[893] However, as already seen, the regulatory landscape changed quickly after the passing of the crisis.

This observation corresponds to the observation made by Despina Chatzimanol. The 're-regulatory fervour' was indeed followed by a 'deregulatory frenzy' as Chatzimanoli predicted.[894] The results are consistent with Chatzimanoli's

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[890] Lourenço, Ciriolo, Almeida & Troussard 2016, 5.

[891] These measures seemed to respond to contestation presented by by Olivier de Schutter in 2008. De Schutter criticised the pre-crisis model of corporate social responsibility and deemed the European Multi-Stakeholder Forum on CSR of 2004 a failure. He stated that the pre-crisis CSR strategy was based on the 'mistaken view that the establishment of a regulatory framework for CSR would threaten the competitiveness of European companies'. De Schutter also criticized the model forrelying on the 'naive (and contradictory) view that reliance on market mechanism will suffice to ensure that corporations will seek to minimize the negative social and environmental impacts on their activities'. (de Schutter 2008, 203.) The social dimension of the economic crisis resulted in the establishment of a regulatory framework called for by de Schutter. Previously the focus had been on correcting negative externalities concerning pollution. This was done by introducing pollution emission allowances and markets for trading in them, *i.e.* the EU Emission Trading System (EU ETS). In terms of political economy, the regulatory framework aimed to fix the 'dysfunctional outcomes', as paraphrased by B. Guy Peters. (Peters 2001 [1999], 45.) As described by William H. Riker and Peter C. Ordershook, as a result of this failure to produce the desired outcome: 'The conscious legislative institutions [were] then employed, as they may also be in the case of "unfair" distribution of income, to modify these market-generated and individually undesired social preferences.' (Riker & Ordershook 1973, 4.) Rules were changed so as to better meet the needs and values of society. What has been seen to take place was no surprise.

[892] According to Martijn W. Hesselink, Chantal Mak and Jacobien W. Rutger, the issue of social justice and business was recognised in the 2003 Draft Common Frame of Reference of European Contracts Law. However, the ideas were not materialised in the Commissions' policies at that time. (Hesselink, Mak & Rutgers 2009, 11. See also Von Bar, Clive & Schulte Nölke (eds) 2009.)

[893] See e.g. Bonciu 2018; Damjanovic 2013.

[894] Chatzimanoli 2011, 322.

observation that Union legislation oscillates between periods of calm and re-regulation, the period of financial and economic crisis creating a period of re-regulation when the Union aimed to respond to the fundamental challenges.[895] This observation also corresponds with Daniel Kinderman's research.[896] The Union has also, nevertheless, remained a standard setter. The re-regulation aims to provide a framework in which consumers, investors, shareholders and public authorities may, through contractual relations, steer businesses towards more sustainable practices, as Danny Busch and Mirik B. J. van Rijn observed.[897] While particularly the social sustainability of business was an issue posed and perpetuated by the crisis, the Union prefers indirect steering over and above regulatory steering, which is consistent with the research of Mária Antošová and Adriana Csikósová, as well as Steen Vallentin and David Murillo.[898] Although social cohesion and welfare remain essential objectives in the Union, they are pursued through economic growth, which means that economic growth takes precedence over social objectives.[899]

Compared to the regulatory strategy *status quo ante*, one fundamental change was increasing transparency. Olivier De Schutter described in an article 'Corporate Social Responsibility European Style' (2008) how the discussion on the modernisation of the Accounting Directives was launched already in 2001–2002. On 28 May 2002, the Commission presented its proposals for modernising the Council directives setting requirements for preparing the annual accounts of companies and the preparation of consolidated accounts.[900] Those proposals comprised the inclusion of non-financial information relevant to the understanding of the performance of the business and its position at the end of the year. The Commission proposed that the information included in the annual review should comprise an analysis of environmental, social, and other aspects relevant to understanding the company's development and position.[901] The European Parliament supported the proposition.[902] 'However', as De Schutter states, 'in a revised proposal made by the Commission in October 2004, the idea was dropped, apparently as a result of the

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[895] Ibid.

[896] Kinderman 2013, 701.

[897] Busch & van Rijn 2018.

[898] See Antošová & Csikósová 2015, 733; Vallentin & Murillo 2012, 825.

[899] See Porte & Heins 2015; Lammers, Gerven-Haanpää & Treib 2018; Pye 2017.

[900] De Schutter 2008, 231. See COM/2002/0259 final.

[901] De Schutter 2008, 232.

[902] See European Parliament Resolution on the Commission Green Paper on Promoting a European Framework of Corporate Social Responsibility, COM/2001/0366 final (C5-0161/2002-2002/2069(COS), 30 April 2002).

consultations held following the initial proposals of 2002'.[903] The Commission had received over 200 responses to the original proposal, of which approximately half came from the business community.[904] As concluded by De Schutter, '[a]ny obligation to report on non-financial matters was excluded'.[905]

The adoption of the Country-by-Country Report Mechanism just a few years later seems to include many of the measures previously rejected. The CBCR, however, is focused on particular sectors and tax transparency. It does not penetrate the corporate veil completely but does provide more information for investors, consumers, as well as governments and non-governmental organisations. This information may be used to steer businesses in a socially acceptable direction. The objective is, however, to avoid direct intervention.

The Union seems not to have taken any further steps to enforce binding social duties for business but to rely on awareness-raising and excise taxes.[906] The end of the financial crisis revealed a strategy of rolling out previously planned or recently implemented regulatory measures and stepping back from the interventionist approach adopted during the crisis. The final test for this statement is pending as in January 2022 we awaited Commission's response to the European Parliament's recommendations for rules enforcing corporate due diligence and corporate accountability through the supply chain.[907] The European Parliament adopted its recommendations on 10 March 2021. The EU remains active but focuses on providing economic incentives and establishing a regulatory framework that ensures business opportunities rather than creates legal obligations.

The strategy following the passing of the economic crisis reflects the significance of pragmatic evaluation and the critical role of extrajudicial variables. The same is discernible in the measures adopted to respond to persisting and emerging challenges. The COVID-19 crisis has brought both challenges and opportunities to pursue Union objectives. The Union directs COVID aid primarily for projects and undertakings supporting a green and digital transition, combatting climate crisis and

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[903] De Schutter 2008, 232.

[904] Ibid., fn. 106 at 232.

[905] Ibid, at 232.

[906] See e.g. COM/2019/22 final. Excise tax, which is also referred to as *Pigovian* tax, taxes harmful products more heavily, steering buyers towards less heavily taxed and less harmful products. We may soon see social taxes alongside the currently used environmental taxes. As Stephanie Bijlmakers, Mary Footer and Nicolas Hachez (2015) have reported, the EU Human Rights initiatives are focused on soft instruments, such as incentives, guidance and coordination.

[907] T9-0073/202. See below Ch. 10.4.3.

harnessing technological progress in a manner that benefits the global competitive status of European business.[908]

In response to the COVID-19 pandemic, the tools adopted resemble those adopted to tackle the recession of 2008−2014. Hence, the economic and social challenges created by the pandemic are tackled through *economic support*. The EU encourages and enables the Member States to provide financial support for businesses of all types and sizes. The EU and its Member States support the business sector to avoid massive lay-offs.[909]. The EU also pays attention to SMEs.[910] The EU has facilitated bank lending for households and businesses through a banking package.[911] The EU has also outlined measures to support critical industries, such as the food industry.[912]

However, unlike in the case of the financial crisis, the COVID-19 crisis has not led to the correction of market mechanisms by apportioning legal duties for businesses. The virus was presumably transferred from animals to humans in a food market. Hence, the issue relates to food security, and European business has not played any role in its emergence. In addition, the regional regulatory framework for food safety has learned lessons from cases such as the mad cow disease (BSE) outbreaks in 1986 and foot and mouth disease (FMD) in 2001.[913]

While combatting the climate crisis has increased the amount of restrictive regulation , for example, prohibition of certain single-use plastics[914], the focus is on providing positive incentives. For example, the development of Artificial Intelligence includes risks to European values, but the emphasis is on utilising the opportunities AI provides for business and ensuring European competitiveness in the development of new technologies.[915]

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[908] IP/20/940.

[909] See COM/2020/139 final.

[910] See IP/20/569; IP/20/459.

[911] IP/20/740.

[912] COM/2020/141 final. Cf. In state-led capitalist societies, such as Japan, Hong Kong and Singapore, economic support was given directly to consumers through cash pay-outs. These pay-outs covered most households and adult population. On state-led capitalism, see Schmidt 2009, 520. On cash payouts, see e.g. https://www.japantimes.co.jp/news/2020/08/25/national/almost-japan-households-received-virus-relief-cash-handouts/ (Accessed on 23 September 2020); https://www.cashpayout.gov.hk/eng/index.html (Accessed on 23 September 2020): https://www.singaporebudget.gov.sg/budget_2020/budget-measures/care-and-support-package (Accessed on 23rd September 2020).

[913] See e.g. Reg. (EC) 999/2001.

[914] Directive (EU) 2019/904.

[915] See e.g. COM/2018/0237 final; European Commission. 2019; Independent High-level Expert Group on Artificial Intelligence 2019; 1010 COM/2020/065 final, 1.

10.2.2 The Stabilising Effect of the CJEU?

The risks related to technological development, notably increased data collection, processing and transfer, created challenges concerning the realisation of fundamental non-market liberties and rights, such as the right to privacy. Furthermore, frequent data breaches during the 2000s caused many nations to tighten their data protection regulations. The Commission responded to the challenges by adopting a strategy to strengthen the EU data protection rules. However, the strategy emphasised reducing the administrative burden for business and increasing the free flow of personal data in the EU. Outside the EU, the objectives were to 'strive for the same levels of protection in cooperation with third countries and promote high standards for data protection at a global level'. This approach is policy-oriented rather than regulation oriented as demonstrated by the statement on the Commission's objective to 'examine other measures, such as encouraging awareness-raising campaigns on data protection rights and possible self-regulation initiatives by industry'.[916]

However, three landmark cases from the CJEU were to change this approach. Firstly, in *Digital Rights Ireland*, the CJEU studied the Data Retention Directive (Directive 2006/24/EC) concerning the availability of data generated or processed for prevention, investigation, detection and prosecution of serious crime, such as organised crime and terrorism.[917] According to the judgement, the data retained makes it possible to

> [--] know the identity of the person with whom a subscriber or registered user has communicated and by what means, to identify the time of the communication as well as the place from which that communication took place [--][918]

It also makes it possible to know

> [--] the frequency of the communications of the subscriber or registered user with certain persons during a given period.[919]

All in all, this allows

> very precise conclusions to be drawn concerning the private lives of the persons whose data has been retained, such as the habits of everyday life, permanent or

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[916] IP/10/1462.

[917] Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung and Others* [2014] ECLI:EU:C:2014:238.

[918] Ibid., [26].

[919] Ibid.

> temporary places of residence, daily or other movements, the activities carried out, the social relationships of those persons and the social environments frequented by them.[920]

Another case strengthening the protection of rights to privacy was the so-called *Google Spain* of 2014. In this case, the CJEU decided that any operator processing personal data, such as Google

> is obliged to remove from the list of results displayed following a search made on the basis of a person's name links to web pages, published by third parties and containing information relating to that person, also in a case where that name or information is not erased beforehand or simultaneously from those web pages, and even, as the case may be, when its publication in itself on those pages is lawful.[921]

The case law establishes a 'right to be forgotten' derived from the fundamental right to privacy.

Finally, in its judgement in Case C-362/14 *Maximillian Schrems v Data Protection Commissioner* (2015), the CJEU found that under EU law, the Commission's US Safe Harbour Decision (2000/520/EC) did not limit the storage of personal data transferred from the EU to the United States to what was 'strictly necessary'.[922] Neither did the legislation allow individuals to pursue legal remedies which compromised the fundamental right to effective judicial protection. The Court added that legislation permitting the public authorities to access generalised data compromised the 'essence of the fundamental right to respect of private life'.[923] Finally, the CJEU found that the Safe Harbour Decision 'denied the national supervisory authorities their powers' to study the compatibility of decisions with privacy protection and held that the Commission did not have the competence to restrict the national supervisory authorities' powers in that way. [924]

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[920] Ibid., [27].

[921] Case C-131/12 *Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González* [2014] ECLI:EU:C:2014:317.

[922] Case C-362/14 *Maximillian Schrems v Data Protection Commissioner* [2015] ECLI:EU:C:2015:650, Judgement, [90]–[93].

[923] Ibid., [94]–[95].

[924] Ibid., [103]. An interesting difference emerged between the EU and USA in relation to data protection. The rising of the case of *Maximillian Schrems v Data Protection Commissioner* was influenced by Edward Snowden's leak about on the US National Security Agency (NSA) concerning the gathering of data. While the CJEU evaluated the US Safe Harbour Decision in light of the legitimacy of the collection and use of personal data, the US legislators were mostly concerned about the lack of necessary regulation to provide such authority for the NSA's authority to collect data, leading to the institutionalisation of surveillance with preventive monitoring practised by the United States Foreign

These cases resulted in the adoption of the General Data Protection Regulation (Reg. (EU) 2016/679). The General Data Protection Regulation (GDPR) established vertical and horizontal legal duties for both public and private law entities. It stipulated the duties of data collectors, processors and transfers regarding the right to privacy. It constituted a negative intervention in the liberties and rights of private law entities based on the protection of fundamental non-market liberties and rights. This differs substantially from the Commission's strategy concerning privacy protection and the strategy reflected by the crisis measures. However, many consider the GDPR as determining the standards of privacy globally and as a significant achievement for the EU.[925] Therefore, the GDPR is currently embraced by the European Commission in its policies, considering it as 'central to democratic society'[926] and 'a cornerstone of the European human-centric approach to innovation'[927].

In light of these three cases, the CJEU provides stability for the otherwise dynamic EU law through the application of static principles. However, further analysis of the case law could also answer the questions raised in Chapter 8.3.3, to which the legislative analysis did not provide clear answers: (1) When does the protection of privacy also cover the commercial life-sphere; (2) whose rights are protected; and (3) what constitutes as of justified intervention is in terms of necessity, proportionality, and efficacy?[928]

However, while the CJEU could stabilise the otherwise dynamic EU law, this impact is limited by the principle of primacy the Court itself established and enforced. The EU objectives and principles supersede static principles stemming from general interests and fundamental non-market liberties and rights of natural persons. This is reflected in the case law concerning the right to privacy, the legal basis of which lies *not* in the Member States' constitutional or human rights obligations but in the Charter of Fundamental Rights of the European Union. Furthermore, the CJEU's interpretation of the accession of the EU into the European Convention on Human Rights (ECHR) demonstrates the primacy of the efficacy of EU law concerning international human rights law.[929] Without a solid

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Intelligence Surveillance Court (FISC). Nevertheless, the FISC has wide authority in terms of providing permission for surveillance for the NSA.

[925] See e.g. Goddard 2017.

[926] COM(2019) 374 final, I. Introduction, [2].

[927] Ibid., [5].

[928] See below Ch. 10.4.2.

[929] Opinion 2/13 on Accession of the European Union to the ECHR EU:C:2014:2454, [179]–[200]. See Craig & de Búrca 2020, 394; 414; 419–425.

legal basis provided by the EU itself (although encouraged by the German Constitutional Court in Solange[930]), it is unlikely that such a milestone judgement would have ever been made.

Regarding the division of competence between the EU and the Member States, it is clear that the Court of Justice of the European Union prioritises the effectiveness of EU law, even in difficult interpretative situations. Concerning public economies, the tools include the European Central Bank's pandemic emergency purchase programme (PEPP), which emulates the public sector purchase programme (PSPP) launched on 9 March 2015 to help the central governments of the eurozone Member States. The PSPP was a controversial endeavour as it challenged the interpretation of Article 123 TFEU and Article 21 of the Statute of the European System of Central Banks and of the European Central Bank prohibiting the monetary financing of governments resolved by the CJEU in late 2018.[931] Even though the CJEU had ruled that the PSPP was not against EU law, the German Federal Constitutional Court (FCC) challenged this interpretation in spring 2020 while the PEPP was deployed. The FCC argued that the proportionality of PSPP was not checked before its launch as required by EU law.[932] Although the judgment met with some criticism,, the issue reflects some concern as to whether the EU objectives justify means whose legality remains ambiguous.

The same observation applies to responses to the eurozone crisis. The Member State governments established a European Financial Stability Facility (ESFS), through which they took collateral loans from the European Commission's European Stability Mechanism and International Monetary Fund to fund crisis states. The arrangement caused some controversy because Article 125 TFEU prohibited intergovernmental lending due to the moral hazards of bailing out the Member States practising unsustainable fiscal policies. The establishment of an extra-Union organisation could be seen as an attempt to circumvent the Treaty norm. [933] However, the Court of Justice accepted this mechanism in the *Pringle* judgement, arguing how the Treaty law and the general principle of effective judicial protection

[930] See above fn. 930.

[931] C-493/17 *Weiss and Others* [2018] ECLI:EU:C:2018:1000.

[932] BVerfG, Judgement of the Second Senate of 05 May 2020 - 2 BvR 859/15, [1-237].

[933] See e.g. Schilirò 2014.

> do not preclude the conclusion between the Member States whose currency is the euro of an agreement such as the Treaty establishing the European stability mechanism [--].[934]

The Court based its decision on the observations that

> [--]the Member States are not implementing Union law, within the meaning of Article 51(1) of the Charter, when they establish a stability mechanism such as the ESM where, as is clear from paragraph 105 of this judgment, the EU and FEU Treaties do not confer any specific competence on the Union to establish such a mechanism.[935]

In conclusion, the dynamic nature of EU law is strong, irrespective of the contribution of the CJEU to the protection of fundamental rights recognised in the Treaty. Also, in situations where there is room for interpretation, the CJEU seems to be ready to support the attainment of EU objectives.

10.2.3 The Static Nature of the EU Dynamic Principles

The preceding analysis demonstrated how the measures supporting general interests and fundamental non-market liberties and rights need to be aligned with the principles and objectives of the EU. On that account, the dynamic principle of market competition seems to take primacy over the EU economic objective of market integration in the case of conflict of standards.[936] The general interests of the Member States as self-standing principled arguments do not justify the measures adopted . Hence, the general interests of the Member States do not constitute a principled argument *sensu stricto. The general interests of the Member States took precedence over the EU's integration objective when general interests coincided with the competition principle*.[937]

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[934] C-370/12 Thomas Pringle v Government of Ireland and Others [2012] ECLI:EU:C:2012:756, Judgement, [186], 2.

[935] Ibid., [180].

[936] This statement is consistent with the assumed role of dynamic principles in the EU legal system put forward in Chapters 3.1.2 and 6.2.2.

[937] This conclusion is truly correct only if the measures were not taken because they were believed to benefit the integration in the long run, one might add. The question not considered within the scope of this research is how much the concept of 'fairness' referred to in many of the measures adopted, as demonstrated in Chapter 7.2.3, refers to social values. The concept of fairness was particularly notable in measures taken to tackle tax evasion and market abuse. Does the adoption of stricter rules and sanctions on violation aim to 'demonstrate a stronger form of social disapproval' as stated in the Directive on criminal sanctions for market abuse (2014/57/EU, Preambles, [6])? If so, is the corporate entity considered to be morally autonomous or is it the natural persons associated who should feel

Between the principles of EU law, on the other hand, the dynamic principle of competition seems to override the EU's integration objective if these two collide. However, in most cases, both the general interests of the Member States and EU objectives are promoted through measures that either comply or utilise market integration, including the protection of the stability of public finances pursued through the establishment of the European Banking Union.[938] Moreover, in several cases, the measures adopted both *necessitate and lead to further integration*.[939]

The only exception remaining seems to be the establishment of the financial transaction tax that *de facto* limited the free movement of capital in the EU internal market, as Chapter 8.2.2 demonstrated. Chapter 8.4.2 noted how the Commission's proposal for a Council Directive implementing enhanced cooperation in the area of financial transaction tax seemed to connect the FTT to social values about the 'just', 'proper' or 'right' division of tax burden. As the previous chapter recognised, the Commission's proposal for a Council Directive implementing enhanced cooperation in the area of financial transaction tax seems to have a strong connotation of social acceptability. However, Commissioner Šemeta's statements on fair tax competition point towards impartiality.[940] The Commission Action Plan to strengthen the fight against tax fraud and tax evasion argued how tax evasion

> [--] does not only erode Member States' tax bases but also endangers fair competitive conditions for business and, ultimately, distorts the operation of the internal market.[941]

It cannot be ruled out here that, in this singular case, social values constituted principled arguments for establishing FTT contrary to the dynamic principle of competition. Nevertheless, a more likely option seems to be that the FTT is a *strategic choice*. It is a concession made to ensure the long-term integration of the banking and

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concern about social disapproval? Or are the sanctions there for more impartial application of rules and enforcement of competition? Do the sanctions merely provide morally neutral incentives, such as reputational costs and loss of potential clients and investors? These questions should be further studied to clarify the purpose of sanctions and the efficiency of enforcement.

[938] See above Ch. 7.2.1 & 7.2.2.

[939] The financial crisis, for example, was met with the further integration of the banking and financial sector, even though one of the reasons for the severity of the crisis in Europe was the close interconnection of the banking and financial sectors of the Member States. The social challenges created by an integrated labour market is responded with a gradual transition towards a common social security system for those active in the labour market. (See e.g. COM/2013/0083 final.) With every step of integration, more extensive areas of society became governed by the dynamic principles of the European Union. (See discussion in Chapter 10.4.)

[940] See above Ch. 8.4.2; IP/14/1105, [2].

[941] COM/2012/0722 final, 3.7, [2].

financial sector that had suffered a battered image. It is a concession made to preserve the EU's legitimacy in the eyes of the Member States and European citizens and protect the achieved level of integration in the long run and the conditions for further integration after the crisis. This interpretation seems even more plausible when considering other measures adopted related to social approval. In the area of competition, the EU took measures to share the risks and benefits of economic operations fairly. In its Communication on the 'Stronger Role of the Private Sector in Achieving Inclusive and Sustainable Growth in Developing Countries', the Commission stated how, in

> '[p]artnerships with the private sector [--] [t]he risks, costs and rewards of a joint project have to be shared fairly'.[942]

Again, although the term 'fair' can have value connotations, these values are enforced through contractual clauses rather than direct legal duties.

It has become apparent that the static principles stemming from the common constitutional traditions and international obligations of the Member States do not appear as static principles in the EU legal system *sensu stricto*. Although they reflect fundamental social values and ends in themselves, these principles are balanced directly against the dynamic principles of the European Union describing a means to an end. This has been recognised in the principles of legal governance of corporate entities, recognising that intervention in the general liberties and rights of corporate entities is feasible *in any efficient measures* to achieve Union objectives or to protect general interests recognised by the Union or promote fundamental non-market liberties and rights of natural persons. The efficiency of measures is evaluated according to the principles of the European competitive social market economy (ECSME). Without the layer of dynamic principles added by the EU legal system, intervention in the liberties and rights of corporate entities would be possible in any measure to protect general interests or fundamental non-market liberties and rights recognised by the Member State's constitution. While the efficiency of measures would be evaluated, rarely would there be predefined and constitutionalised criteria, as is the case with the EU.

In the EU, the dynamic principles of the European competitive social market economy embedded in the Treaty law act *as if they* were static principles. Therefore, they can be directly balanced against static principles. There seem to be no principled arguments stemming from the static principles that would require the EU to

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[942] COM/2014/263 final, Box 1, (4).

intervene in the legal powers of corporate entities stemming from the dynamic principles of the EU.

However, this static nature of EU dynamic principles is arguable based on *pacta sunt servanda*. By becoming a member of the European Union, the states have undertaken a contractual obligation to upholdthe principles of ECMSE embedded in the Treaty law. According to Article 120 TEU:

> Member States shall conduct their economic policies with a view to contributing to the achievement of the objectives of the Union, as defined in Article 3 of the Treaty on European Union, and in the context of the broad guidelines referred to in Article 121(2). The Member States and the Union shall act in accordance with the principle of an open market economy with free competition, favouring an efficient allocation of resources, and in compliance with the principles set out in Article 119.

In the *Van Gend en Loos v Nederlandse Administratie der Belastingen* (1962), the CJEU established how Member States are obligated by the EU law establishing the principle of primacy.[943] The principle of primacy also applies to national constitutional law. According to the case law, the general interests of the Member States do not justify derogation from the primary norms and general principles of EU law.[944]

This can be seen to have its fundamental basis in international law and the principle of *pacta sunt servanda* established in Article 26 of the Vienna Convention on the Law of Treaties between States and International Organizations or Between International Organization (1986) [945], even though the judgement itself refers neither to the principle nor to the Vienna Convention. As the withdrawal of the United Kingdom from the EU, or 'Brexit', demonstrated. the European Union is a 'legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields'[946], and according to Article 42(2) of the Vienna Convention, a withdrawal of a party may take place 'as a result of the application of the provisions of the treaty or the present Convention'.

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[943] Case 26/62 NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration [1963] ECLI:EU:C:1963:1, Summary, 3.

[944] See e.g. C-478/98 *Commission v Belgium* [2000] ECLI:EU:C:2000:497, [44]—[45]. See Craig & de Búrca 2015, 722—725: 'It is clear moreover that Article 63 covers not only measures that discriminate on grounds of nationality, but also measures that may impede capital movements, even though they are not discriminatory' (Craig & de Búrca 2015, 723).

[945] See e.g. Klabbers et al. 2011.

[946] Case 26/62 NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration [1963] ECLI:EU:C:1963:1, Summary, 3.

The CJEU case law has demonstrated the binding nature of the EU law at all levels above the constitutional law and international obligations of the Member States. Irrespective of cases such as *Digital Rights Ireland*, the Court does support the pragmatic solutions formulated on the policy level when necessary for achieving Union objectives. Indeed, one can speculate whether the CJEU's decisions are imperative for securing the long-term legitimacy of the EU's economic policies, which continue to transfer economic power to the private sector and corporate actors. When the Court establishes such horizontal legal duties, it simultaneously provides both limits and legitimation for private power in society. The Court both requires responsibility from data managers and *provides them with some level of authority to decide the boundaries of privacy*. This raises the question of the limits of corporate legal powers discussed in the following chapter.

10.3 Legal Personhood & Legal Governance of Corporate Entities in the EU

10.3.1 Corporate Legal Personhood in the EU

The model of corporate legal personhood proposed in this research builds on three competing models. The first model is the 'real entity model'. Arthur W. Machen, Jr. described the two key propositions of the real entity model in 1911. Firstly, a corporation is a real entity because it exists without recognition from the State, and secondly, it is also autonomous vis-à-vis its associated members because it is more than the sum of its parts.[947] Another competing model is the 'artificial entity model', also referred to as 'concession theory' or 'fiction theory' by John Dewey (1926). Artificial entities are also referred to as 'unnatural' instead of 'natural' legal persons.[948] Finally, there is the 'aggregate entity model', also referred to as the 'contract model', which sees corporations as aggregates of their members.[949] As already recognised by Machen in 1911, the issue with all these theories is that each model may be manipulated to accommodate a variety of legal powers.[950] Also, none of the models *alone* seems to be able to explain the legal powers of corporations as

[947] Machen 1911, 258.

[948] Gindis 2016, 503.

[949] Phillips 1994; Donyets-Kedar 2017, 66.

[950] Machen 1911, 348.

legal entities. Nevertheless, the aggregate entity model came to dominate the field, and the debate on the legal personhood of corporations fell dormant to reawaken during the 1990s.[951]

The early 21st century brought growing attention to the legal personhood of corporate entities. One probable reason was the increasing support for the real entity model, used to argue for liberating corporations from State control by juxtaposing them with natural persons. Another reason lies in the increasing attention to legal personhood generally, theorising the legal personhood not only of corporations but also of animals and Artificial Intelligence.[952] However, the debate on the legal personhood and legal powers of corporate entities, in particular, seems to have taken place altogether outside the EU legal system.[953]

The *hybrid theory of corporate legal personhood* proposedby this research aims to fill a gap in the current understanding of the legal personhood of corporate entities. To summarise the idea presented in this research, corporate entities may hold legal powers in the economic life sphere in very much the same manner as natural persons, making them as 'real' as natural persons are. Nevertheless, these legal powers of CEs stem from the associated members and the State. In company law, corporations are aggregate entities created through a contract between the associated members. The State may recognise the corporate entity created through a contract as an autonomous legal entity, adding a surplus of legal personhood. Statutory legislation determines the legal powers of the corporation as an autonomous legal entity. Hence, corporate entities as autonomous legal persons are contractual associations of natural and legal persons to which the State has provided autonomy through statutory legislation. As a result, statutory legislation creates a surplus of legal personhood. This surplus of legal personhood means that the corporation as a legal entity may acquire rights, make contracts, or be a party to a legal proceeding.[954]

The legal powers of CE are greater than the sum of the parts of the legal powers of associated natural persons. Limited liability companies, in particular, can be seen to have a high level of autonomy even from the associated entities because the associated entities are not primarily responsible for the corporation's contractual obligations. Therefore, limited liability creates a positive intervention on freedom of contract. Statutory legislation establishing limited liability companies (LLCs) establishes a privileged position for shareholders in LLCs compared to shareholders

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951 Phillips 1994, 1065.

952 See e.g. Kurki 2019.

953 See above Ch. 2.2.3.

954 See above Chs. 2.1 & 5.4.

in a non-limited company. However, corporations recognised as autonomous legal persons may be stripped of their legal personhood. The nullification of CE constitutes a negative intervention in the contractual freedom of the associated entities, but only to the extent that it concerns the surplus of legal personhood created by the transference of legal power. The negative intervention merely *cancels out* the previous positive intervention, restoring the previous state of legal powers.[955]

This research focused on the recognition of the legal powers of corporate entities in the European Union. According to the systematisation and interpretation of the EU primary legislation, the outcome was that the European Union provides CEs with particular rights and privileges. In Article 54(2) TFEU, the EU provides for-profit businesses access to internal market liberties and rights, such as freedom to provide services and freedom of establishment. Corporations may also offer their services in the internal market without discrimination. The internal market rights derived from the principles of equal treatment, non-discrimination, mutual recognition, proportionality and transparency ensure that CEs are treated equally irrespective of the Member State according in which they have been established or in which they operate.[956]

An important observation is how the legal powers of CEs as artificial entities stem from their social function, which in the case of corporate entities is *doing business*.[957] Therefore, the liberties and rights of corporate entities as autonomous legal persons are limited to the economic life sphere or, to be more precise, the commercial life sphere. The predominant idea in the legal governance of corporations in the EU is that corporations are business entities with social functions to create economic activity and efficiency, and providing corporations with separate legal personhood facilitates this function. Providing corporations with separate legal personhood increases economic activity by simplifying transactions while simultaneously creating efficiency through the concentration of economic power, balanced with competition law.

The research focused on the period 2008–2014, *the model of corporate legal personhood agreed with the codification adopted by the EU in 2017*. Directive (EU) 2017/1132 relating to certain aspects of Company Law codifies key articles concerning the establishment and functioning of limited liability companies (LCCs). According to the directive, a limited liability company is a company with 'share capital and having legal

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[955] See above Ch. 6.4.2.1.

[956] See above Ch. 5.3.1.

[957] See above Chs. 3.1.1 & 5.4.2.

personality, possessing separate assets which alone serve to cover its debts [--]'.[958] highlighting the economic nature of the corporate legal person.[959] Furthermore, according to Article 11(b), the legal personhood of a corporate entity is conditional on being established according to national laws. Also, according to Directive (EU) 2017/1132, a company may be nullified, i.e. its legal personhood can be taken away. According to Article 11(a) 'nullity must be ordered by decision of a court of law'. Article 11(b)(ii) also establishes that nullity may be ordered if the 'objects of the company are unlawful or contrary to public policy'. Therefore, it verifies that the *legal personhood of a corporate entity is established by law*.[960]

CEs may be stripped of their legal personhood if their objectives are unlawful, while according to our current understanding, such actions cannot be taken against natural persons even if they have broken the law, which emphasises *the artificial nature of corporations as autonomous legal persons*. The difference between natural persons and corporate entities is that the legal powers of corporate entities stem from their recognised social function of doing business. Although natural persons may act in the economic life sphere and be subjected to negative intervention in property rights and freedom of contract when practising business, they are also actors in the non-economic sphere. Consequently, natural persons have legal powers that corporate entities do not. We next investigate the extent and limits of corporate legal powers.

10.3.2 The Limits of Corporate Legal Power

The question about the limits of the legal duties of corporate entities is perhaps more intriguing than the extent of their liberties and rights. Chapter 1.2 referred to several studies outlining the limits of legal duties for CEs in the field of international law (IL) and human rights law (HRL). However, as to the legal powers of CEs in the EU legal system, there seems to be a research gap in recognising the limits of legal duties for CEs. Nevertheless, research in IL and HRL provides a relevant framework.

Most importantly, IL and HRL are not directly applicable to private law entities (PLEs), excluding those principles of international labour law constituting the customary law. At first glance, it would seem that the nature of corporations as private law entities constitutes principled arguments against establishing legal duties for corporations based on IL or HRL, as observed by Dawn Oliver and Jörg Fedtke

[958] Dir. (EU) 2017/1132, Art 119(1)(b).

[959] See above Ch. 5.4.3.

[960] Ibid.

(2007). The legal duties of PLEs stem from civil law: corporate entities as legal persons have the same legal duties as natural persons, which stem primarily from respecting the civil and political rights of other PLEs.[961] Legitimate limitations on liberties include limitations made to protect third parties from 'non-contractual liabilities'. [962] These observations resonate strongly with EU law, where the horizontal duties of CEs stem from their contractual relations with shareholders, consumers and employees.

The source of legal duties for corporate entities in contractual market relations is the *imbalance of power* in such contractual relations and the solidarity market rights established to recognise such imbalance.[963] In Oliver's and Fedtke's theory, this imbalance is the most significant between the State and individuals, which is why human rights law protects individuals only against State actors. However, as Oliver and Fedtke concede, global companies may have significant social power.[964] The question of establishing international rules for corporations corresponds with this development, even though attempts to establish global rules for business have failed. Nevertheless, this failure is *not* due to principled arguments against legal duties for corporate entities also in horizontal legal relations. On the contrary, corporate legal duties have increased in both vertical and horizontal relations, reflecting the global and local power of corporations.

Horizontal legal duties are nevertheless limited to pre-contractual and contractual market relations, which resonates with Ratner's theory on corporate legal responsibility.[965] Steven R. Ratner (2001) explicates that corporations may have legal duties stemming from the rights of actors with 'whom they have special ties', such as employees.[966] Like Oliver and Fedkte, Ratner highlights the protection of corporations from non-contractual duties but recognises simultaneously that contractual relations are not a *sine qua non* for legal duties. Although considering it necessary to restrict the legal duties to 'those sorts of rights that the corporation can directly infringe'[967], Ratner recognises that the obstacle to establishing legal duties for CEs is not the exhaustion of infringeable rights but the lack of consensus.[968]

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961 Oliver & Fedtke 2007, 3.

962 Ibid., 9–10.

963 See above Chs. 6.2.2, 4.3.1.4 & 5.3.2.

964 Oliver & Fedtke 2007, 16.

965 See above Ch. 1.2.2.

966 Ratner 2001, 449.

967 Ibid., 511.

968 Ibid., 506–511.

Indeed, as recognised by Collins, on the national level where such consensus is easier to achieve, private law incorporates many of the social values represented by human rights.[969] Thus, it is necessary to reconsider the statements that corporate entities should not carry legal duties outside contractual relations because of their nature as private law entities.

The EU primary legislation, particularly the Charter of Fundamental Rights, reflects values stemming from the Member States' constitutional traditions and international obligations. Nonetheless, this study on the legal governance of corporate entities in the EU has demonstrated the significance of the dynamic principles of the European competitive social market embedded in Treaty law. The principle of competition has previously resulted in the Member States lowering their regulatory standards to 'improve their relative competitive position in the global economy', as Anu Bradford described.[970] Based on this research, these dynamic principles and the pragmatic arguments stemming from therein are why the horizontal legal duties of corporations are limited to contractual relations. Even when aiming to raise the standards of corporate social responsibility, the EU has adopted framework regulation that indirectly encourages corporations to adopt more socially sustainable practices.[971]

Nevertheless, corporate legal personhood does not seem to provide any principled arguments against extending the scope of horizontal legal duties outside contractual market relations. Indeed, the Court of Justice of the European Union seems to recognise horizontal duties stemming from corporate power extending outside the economic life-sphere and into non-contractual non-market relations. Most notably, in *Google Spain,* the CJEU established the 'right to be forgotten' that created a horizontal legal duty for Google to 'remove from the list of results [--] links to web pages [--] containing information on that person [--] when its publication in itself on those pages is lawful'.[972] This legal duty extends outside contractual market relations. The users of services agree to the terms and conditions of data services, and a transaction takes place even when individuals use 'free' Google services. However, the 'right to be forgotten' does not require a person to be a user of these services, merely that their information is accessible through the data services in question. Nor was the ruling prevented by the fact that Google Spain was a separate

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[969] See Collins 2014, 26–27.

[970] Bradford 2012, 4.

[971] See above Chs. 7.2.5, 7.3, 8.2.4 & 8.3.2.

[972] Case C-131/12 *Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González* [2014] ECLI:EU:C:2014:317.

legal person from the data controller, the parent company Google Inc., established to promote online advertising.[973]

The cases considered in Chapter 10.2.2., influencing the development of EU privacy law significantly, demonstrated how the legal duties of private law entities could correspond to their *de facto* power in horizontal non-contractual non-market relations—stemming from the recognition of corporate influence on individual natural persons in modern society. Through regulation, corporate social power becomes recognised and formalised. There are no legal limits for corporate legal duties that would stem from protecting corporations from non-contractual obligations, although practical questions may deem some duties impractical or inappropriate.[974]

Summa summarum, based on this research, the legal powers of CEs stem from their social function.[975] The EU law reflects an idea of corporate entities as legal persons whose personhood is limited to the commercial life sphere—corresponding to their social function.[976] Hence, the liberties and rights of CEs are entirely subjectable to a pragmatic evaluation of the costs and benefits of regulatory intervention.[977] As the crisis measures demonstrated, while regulatory costs for business are carefully considered, these can be balanced against benefits to society at large as well as to individual natural persons.[978] Even as corporate entities hold no inalienable rights, there are strong pragmatic arguments against overburdening corporate entities with regulation. The use of market mechanisms to promote economically, environmentally and socially sustainable business is an example of this.[979] However,

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[973] Ibid., [43].

[974] For example, the EU neither establishes nor recognises criminal liability for murder for a CE. Perhaps this is because it is not able to 'will' such an act, and the liability would not, hence, have preventive force. Corporate entities as autonomous legal persons may, however, be responsible for environmental crimes according to EU law. Again, CE is not able to 'will' active disregard for environmental regulation. The environmental liability of the CE does, however, establish efficient corrective power, as the CE may have a duty to remedy the environmental damage. Whether this is an efficient way to prevent further damage from those that have 'willed' them is a different question. To argue that the CE needs to gain economic benefit from the crime could also be used to establish criminal liability for murder. Indeed, corporations may be culpable for murder in the UK. It seems apparent, however, that the EU does not encourage further criminal liabilities for CEs. See e.g. Corporate Manslaughter and Corporate Homicide Act 2007, available at https://www.legislation.gov.uk/ukpga/2007/19/contents (Accessed on 24 July 2020).

[975] See above Ch. 2.1.

[976] See above Ch. 5.

[977] See above Ch. 6.4.

[978] See above Ch. 8.3.

[979] See above Chs. 7.2.5, 7.3. & 8.2.4.

there are no principled arguments against extending corporate duties outside non-contractual obligations, but the question is about finding the best possible approach to achieve the well-being of individuals and societies short-term and long-term, locally and globally, which reflects on the legal governance of corporate entities during the financial and economic crisis.

The following chapter will discuss the contributions and implications of the research. However, it will also concede its limitations and make proposals for future research.

10.4 Contribution, Implications & Recommendations

10.4.1 Between Real & Artificial Personhood

Chapter 3.1.1 described the ontological assumption of the research, recognising legal systems as social institutions. It agreed with David J. Calverley's arguments that 'law could simply define a legal person to be anything law chooses it to be'.[980] However, as *Holger Fleischer* points out, the EU has 'bypassed the thorny issue of the doctrinal history of legal personality'[981], which is reflected in legislation, legal practices and legal research as vagueness in our understanding of corporate entities as legal persons. A significant proportion of legal research on corporate regulation focuses on studying the impact of regulation on corporate performance case-by-case. The research lacks reference to any theoretical understanding of corporations as legal persons. Therefore, the research gap identified was the legal personhood of corporations in the European Union.

Therefore, this research formulated a model of corporate legal personhood, applied the model to corporate entities in the EU, and discussed how the model serves as a basis for further discussion and the development of a shared understanding of the nature of corporations as legal entities to avoid the issues arising from ambiguous law.[982] The model also provides a tool for comparative research: By applying the hybrid model, a picture can be formed of how different legal systems emphasise the three different aspects of the model: the real entity

[980] Calverley 2011, 224.

[981] Fleischer 2010, 1704.

[982] See above Chs. 2.1, 5.4 & 10.3.1.

model, the aggregate entity model and the artificial entity model. In addition, the hybrid model applies as a general model of legal personhood to associations with different social functions, such as political parties, governmental organisations and non-governmental organisations.[983] The model also applies to other 'artificial' entities, both abstractions created by the human mind as well as self-standing and self-functioning human-made objects. Self-standing tangible objects may include paintings, statues, buildings, or other objects and structures that are legally recognised as culturally or historically valuable, in which case their values does not lie in being the property of someone but in having an intrinsic value. Laws also protect abstractions, such as languages or surnames. It would be interesting to discuss the applicability of the model to such legal entities.

Another fascinating subject would be the legal personhood of artificial intelligence (AI). While there is no single generally accepted definition for AI, its key features include *autonomy* and *adaptability*. While protection refers to the abstraction or object being *passive*, in the case of artificial creations that *interact* with the surrounding environment, the question of legal liabilities and, hence, legal personhood becomes more relevant. Recent technological development has raised the question of the legal nature of AI. The hybrid model of legal personhood presented here could provide some conceptual tools for assessing the possibility of AI legal personhood and constructing legal personhood for AI. Hence, the contribution of the research concerning the legal personhood of non-natural legal entities also extends to other non-natural legal entities.

Establishing a clear understanding of the legal personhood of corporate entities and other non-natural legal entities is critical for high-quality regulation. Hence, it is recommended that the legal personhood model provided here be applied, discussed and developed further to ensure the coherence, consistency and clarity of the European legal system. In addition, recommendations for future research include consideration of the applicability of the hybrid model to other non-natural legal entities, particularly the emerging AI.

When formulating a model of corporate legal personhood in the EU, the research systematised the legal powers of CEs recognised in and established by EU primary legislation. Combined with Peter Oliver's study on the fundamental rights of companies in the case-law of the European Court of Human Rights and the European Court of Justice[984], the research paints a more comprehensive picture of CEs as autonomous legal persons as summarised and discussed in Chapter 10.3.

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[983] See above Ch. 5.4.2.

[984] See Oliver 2015, 694−696.

However, while aiming to provide a comprehensive systematisation of corporate legal powers in the EU, the research has obvious limitations. The image of corporate entities as legal persons is decidedly *abstract*, even to the extent that could easily be called misguided, especially if too much is expected of it. Therefore, making actual recommendations *de lege lata* or *de lege ferenda* seems inappropriate. The research implications are hence *theoretical* rather than practical. However, applying the models developed in future research would make it possible to produce information of more practical relevance for researchers and legislators. The following sections outline some key questions for future research.

10.4.2 Between Legal & Natural Persons

One possible research question recognised here would be to study further the distinction between the liberties and rights of legal persons and natural persons and the justified intervention in the liberties and rights of natural persons. The research at hand recognised the instrumental role of corporate entities as legal persons. Unlike natural persons, who enjoy human dignity and have intrinsic value, the value of CEs is instrumental. Therefore, intervention in the legal powers of CEs is feasiblein any necessary measure for any justified cause. As Arthur W. Machen, Jr. already recognised in 1911, '[i]n order to determine whether a law is just or unjust, its effect upon men, and not corporate personalities, must be considered'.[985] However, Chapter 8.3.3 recognised three major deficiencies: Firstly, it is often unclear whose liberties and rights are at issue. Secondly, the research has also recognised how some liberties and rights enjoyed by market actors overlap with liberties and rights enjoyed by natural persons in civil life, such as the right to privacy. However, this distinction is also not always apparent in the regulation. Thirdly, it is not clear on what basis the measures influencing the civil liberties and rights of natural persons are considered necessary, proportional and efficient.

Therefore, further research on the case law of CJEU is required to fill these gaps and complement the research at hand. The cases studies briefly addressed in Chapter 10.2.2 seemed to demonstrate that the Court actively assesses the fundamental rights impact. Furthermore, the General Data Protection Regulation (Reg. (EU) 2016/679) demonstrates the significant influence of the Court. Therefore, the study of the case law should shed some light on these three questions identified. If the case law does

[985] Machen 1911, 358.

not resolve these questions, further research seems even more imperative as the ambiguities described above could predispose the legal system to incoherence and unclarity and expose it to inefficiency, even abuse.

Hence, while the picture of CEs as legal persons provided here is not complete, the research at hand provides the groundwork for future research with more practical implications. It has also provided *methodological tools* for such research through the *reviewed model of the Hohfeldian typology of legal powers and legal relations*. The original typology focuses on contractual relations between equal autonomous actors.[986] The reviewed typology recognises the trilateral nature of all formal horizontal relations, providing a more accurate description of modern legal relations.

10.4.3 Between Legitimacy & Efficacy

The research recognised how the evaluation of costs and benefits played a key role in the legal governance of corporate entities[987], which is not surprising given the nature of CEs as legal persons and their function of doing business.[988] Nor is it surprising that changes in the extrajudicial conditions of financial stability and economic growth triggered changes in the regulatory environment of CEs both inside and outside the financial and banking sector. The changes in extrajudicial conditions of economic growth and well-being seemed to emphasise the role of minor economic actors. The regulation adopted enhanced the market position of SMEs, individual employees and consumers and of minority shareholders to recover from the crisis, return to economic growth and steer the economy towards sustainable development.[989] Key measures included enhancing the fairness of the market by redistributing the benefits created therein and increasing trust towards the market. The tools included, for example, establishing criminal sanctions for market abuse and stringent monitoring for tax evasion.[990]

While the research focused on the legal governance of CEs, the results imply an instrumental role of natural persons in the European market economy and the achievement of the economic, environmental and social policy objectives. However, these results are consistent with those of earlier research: According to Olha O.

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[986] See above Ch. 2.2.2.

[987] See above Chs. 7.3 & 8.3.2.

[988] See above Chs. 5.4. & 6.4.

[989] See above Ch. 9.

[990] See above Chs. 9.2 & 9.3.

Cherednychenko, the protection of consumers in horizontal relations is instrumental in pursuing the objectives of European integration.[991] P. S. Atiyah has stated how the legislation on consumer contracts established by the European Community since 1980 primarily facilitates transactions.[992] Joint European consumer protection has undoubtedly enhanced the facilitation of transactions in the internal market and, hence, European integration. Atiyah has also stated how 'such rules reflect basic notion of fairness'.[993] However, fairness is not just a fundamental value establishing minimum standards for market relations.

On the contrary, the crisis measures have demonstrated how 'trust' and 'fairness' are essential for *facilitating* transactions.[994] Is 'fairness' in the European market comparable to 'product safety' rather than common European values as standard setters? While in reality, the issue is not 'either-or', the observation raises interesting questions about the role of values in EU legal governance.

One key European value recognisable in EU market regulation is the principle of non-discrimination. While contractual freedom constitutes fundamental market liberty, refusing to sell products, provide services or employ based on gender, racial or ethnic origin, religion or belief, disability, age, or sexual orientation is prohibited.[995] However, the research at hand recognised the potential impact of perceived legitimacy on the efficient functioning of the market system and, hence, on the legal governance of CEs.[996] The research discussed only briefly the judicial and extrajudicial variables that seemed to determine the legal powers and legal relations of CEs during the crisis period. Nevertheless, it would seem that the values written into the Treaty norms are not only to be protected and promoted through legislation. The European value climate influences the efficient enforcement of the EU economic provision, constituting an extrajudicial variable that needs to be considered to achieve the desired economic outcomes.

At the beginning of 2022, two ongoing processes are interesting for enforcing fundamental and human rights in European and global market economies with potentially high implementation costs for businesses. The first process is the Digital Markets Act and Digital Services Act, outlining what—very much simplified—could be seen as the enforcement of the principle of non-discrimination and privacy in the

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[991] Cherednychenko 2014, 171.

[992] Atiyah 2005, 8 & 20.

[993] Ibid., 8.

[994] See above Chs. 8.3.2 & 9.2.1.

[995] See above Chs. 4.3.1.3. See Article 3(3) TEU; Articles 8, 10 & 19 TFEU; Article 21 CFR.

[996] See above Ch. 9.2.1 & 9.3.2.

digital world.[997] The second interesting process concerns mandatory human rights, due diligence rules for businesses operating in high-risk sectors. These rules would enforce corporate due diligence and corporate accountability through the supply chain.[998] The European Parliament adopted its recommendations on 10 March 2021, when the Parliament recognised changes in perceived legitimacy, describing how 'societies are increasingly demanding from undertakings that they become more ethical and sustainable'. The Parliament also considered the benefits for business, arguing how mandatory due diligence would also create 'harmonization, legal certainty and the securing of a level playing field' and 'give undertakings subject to them a competitive advantage'.[999]

However, the European Parliament also recognised perhaps one of the key challenges for its recommendations, the success of which depends on whether or not mandatory due diligence would benefit the interests of the Union and its Member States. While '[t]he Union has adopted mandatory due diligence frameworks in very specific areas with the aim of combating sectors [--] such as the financing of terrorism or deforestation'[1000], it remains to be seen whether the regulatory costs of mandatory rules remain too high from the perspective of EU economic interests. In January 2022, this process is waiting for the Commission proposal. It will be interesting to see the outcomes and compare these two processes and the results provided by the research at hand. Combining the results of such normative research with a *political economy analysis* could further enhance our understanding of corporate legal governance and our ability to describe and explain—if not even predict—the successes and failures of different legislative projects.[1001]As CJEU's judgements in *Digital Rights Ireland* and *Google Spain* demonstrate, implementation costs do not always prevent issuing new legal duties for businesses. While the objective of protecting the fundamental rights of natural persons does not guarantee the passing of legislative recommendations, if perceived illegitimacy weakens the efficient functioning of the internal market, the recommendations seem to have much greater chances of advancing into Commission proposals and EU legislation.

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[997] See COM/2020/825 final & COM/2020/842 final.

[998] T9-0073/202.

[999] Ibid., (13).

[1000] Ibid., (6).

[1001] See e.g. Buch-Hansen & Wigger 2011; Hesselink, Mak & Rutgers 2009; Goldschmidt & Wohlgemuth 2008; Ordershook 1990.

Nevertheless, several normative issues helpful for such research remain to be resolved, particularly when the legal governance of CEs impacts natural persons. The next section elaborates these questions further.

10.4.4 Between Values & Objectives

As recognised above, natural persons play an instrumental role in the EU in advancing the economic, environmental and social objectives of the Union. In addition to being associated with corporate entities, individuals act as private entrepreneurs, investors, consumers and employees. However, the research at hand recognised how the distinction between individuals as market actors and individuals as members of civil society, the political and the social life spheres, is not always clear. To what extent are natural persons as market actors bargaining for legal powers according to their positive impact on the economy and competing for rights side by side with corporate entities? Fundamental ideas on the extent and limits of the instrumentality of the legal powers of natural persons need clarification to render entirely comprehensible the legal governance of corporate entities in the European Union.

As Chapter 10.2.1 discussed, the EU and its Member States acknowledge human behaviour when planning legislation. For example, the General Data Protection Regulation recognises a behavioural bias whereby individuals are more inclined to choose a pre-selected option. GDPR Recital 32 asserts how pre-ticked boxes do not, therefore, constitute the consent intended by the GDPR.[1002] However, not all examples of legislation with behavioural insight aim to protect freedom of decision from behavioural biases. On the contrary, some measures use behavioural biases to steer human behaviour towards healthier or otherwise better choices, e.g. 'rational

[1002] GDPR Recital 32: https://gdpr.eu/recital-32-conditions-for-consent/ (Accessed on 3rd February 2022).

preferences'.[1003] The overall picture of the legal governance of private law entities, both legal and natural persons[1004], implies *constitutional managerialism*.

According to Juha Lavapuro, constitutional managerialism means that constitutional norms *justify* the instrumental use of political power instead of *limiting it*.[1005] The constitutional norms of the EU seem well equipped to accommodate a whole spectrum of regulatory strategies. While the EU primary legislation includes several norms on the protection of fundamental and human rights, creating both negative and positive duties for the legislator, the targets and policies embedded into the EU primary legislation, described here as dynamic principles[1006], seemed to have played a key role in determining the measures adopted. Legal solutions are firmly based on a pragmatic evaluation of costs and benefits, including legal solutions to human rights challenges both locally and globally.[1007] In addition to enhancing economic growth and protecting European competitiveness, one key objective has been to protect the *attained level of integration* and, if possible, to respond to the challenges posed and perpetuated by the crisis by *further integration*.[1008]

The measures studied here recognise how the social influence of corporate entities is enormous and increasing. As the developments in digital justice demonstrate, the legislation aims to respond to the growth of corporate power. However, the responses seem reactive and even incoherent. While the CJEU aims to impose limits on corporate power from static sources, such as the non-market fundamental right to privacy enjoyed by natural persons[1009], in other areas, the protection of such rights has resulted in the adoption of framework regulation that utilises transparency and market mechanisms to achieve the objectives without direct

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[1003] See e.g. Mitchell 2014, 169, 172−177; Baron 2014, 22. However, if the assumption of rationality is not valid, if people do indeed choose to make 'bad' decisions, can we legitimate such public intervention in freedom of decision on the grounds of helping them make 'rational' decisions? As *Thomas S. Ulen* (2014, 120) has pointed out: If personal autonomy is an independent value for which individuals strive and that government policy ought to foster, then that fact may argue for individuals being allowed to make their own mistakes. What are the possible implications of using biases to steer individuals to make 'better' decisions irrespective of their personal preferences, such as having the right to make bad decisions despite the costs? While the question is much more complex than contrasting 'individual autonomy as a value' againt 'rational governmental policy as an objective', the setting is intriguing. The legislation recognises shortcomings in the epistemological assumptions of the European economic model, including the assumptions that individuals have rational preferences.

[1004] See above Chs. 8.3.2, 9.2.2 & 9.3.

[1005] Lavapuro 2010, 7.

[1006] See above Chs. 6.2.2.

[1007] See above Chs. 7.2.5, 7.3, 8.3.2 & 9.2.

[1008] See above Ch. 8.3.2.

[1009] See above Ch. 10.2.2.

intervention on horizontal relations[1010]. While hard law measures have been taken to tackle the issue of private rule-making in the digital economy, the response is not entirely systematic. For example, while tackling the issue of corporate digital power, the EU has simultaneously transferred power to private entities, such as the oversight boards of social media companies.[1011] Nor is the response unequivocally comprehensive. While the 'right to be forgotten' established by the CJEU impacts outside consumer contracts[1012], the emphasis generally is on commercial relations between consumers and digital services providers[1013]. The question that arises is whether there is an institutional collision that contributes to the incoherence of the EU legal system.

CJEU's judgement reflects *the constitutionalisation of European private law*, whereby the impact of human rights and fundamental rights on private law is increasing.[1014] The constitutionalisation of private law constitutes a possible path for the future development of the EU legal system. In 2008, *Hugh Collins* envisaged a European Civil Code, a set of rules that would ensure 'respect for personal dignity' and 'articulate principles and values regarding fairness and justice in social and economic relations with others.'[1015] Constitutionalisation of private law implies that static principles manifesting the key values of society would govern private relations both inside and outside the commercial life-sphere.[1016] However, according to this research, the legislator's approach reflects constitutional managerialism: Regulation, accompanied by market incentives and direct monetary incentives, is used *pro re nata* to nudge, push and pull corporate entities and individuals towards efficient attainment of Union objectives. These observations raise several questions for future research, such as whether such institutional differences in the approaches do indeed exist. Moreover, if they do exist, why and to what effect?[1017] What are the possible

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[1010] See above Chs. 7.3, 8.3.2 & 10.2.3.

[1011] See Voss 2016. See also González & Martinez 2004.

[1012] See abobve Ch. 10.3.2.

[1013] Ibid.

[1014] See e.g. Teubner 2004; Bell 2014; Godt 2014; Micklitz 2014; Scott 2014

[1015] Collins 2008, 6.

[1016] See Teubner 2004

[1017] However, some speculation on the reasons for institutional approaches can be provided based on recent events. As demonstrated by the withdrawal of the United Kingdom from the European Union, Member States expect the EU to create added value. According to Andrew Heywood, the survival of political regimes and legal regimes is dependent on institutions being able to react to changes in the social environment. (Heywood 1994, 97.) Compared to many of the Member States, the EU is young and not as deep-rooted as a political and legal regime. While social values are essential for legitimacy,

implications of different approaches for the clarity, coherence and efficacy of the EU legal system?[1018]

While such questions go beyond the methodological scope of this research, the notions and concepts provided here are tools for comparative research aiming to recognise differences in corporate legal governance and evaluate their impact on the European legal systems. Moreover, the ideas presented here could even constitute a groundwork for further discussion aiming to build *a shared understanding* of the legal governance of corporate entities.

10.5 Summary

The legal governance of corporate entities in the European Union is far from a linear process, which becomes evident in Chapter 10.2 when discussing the relation of the regulatory trends observed between 2008 and 2014 to the long-term developments both before and after the financial and economic crisis. For example, the effects-based approach in competition law that recognised consumer benefits slowly emerged during the early 2000s but gathered new impetus from the social challenges posed and perpetuated by the crisis. However, with the passing of the crisis, a new regulatory strategy emerged, which repealed laws adopted, some still pending enforcement. However, the post-crisis regulatory trend is far from a 're-regulatory frenzy'. For example, the European Union's response to the climate crisis has included many restrictive measures. On the other hand, the EU's response to the COVID-19 pandemic resembles the measures adopted to tackle the economic recession of 2008−2014. As the transference of viruses from animals to humans was a lesson already learned during the mad cow disease outbreaks in 1986 and foot and mouth disease in 2001, the emphasis was on providing economic support for businesses to avoid massive lay-offs.

The regulatory turns witnessed first during and after the financial and economic crisis reflect the dynamic nature of EU law, the 'regulatory pendulum' already

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the EU needs to create added value. The creation of added value seems to be much more topical in institutions representing the Member States, their citizens and the general interests of the EU. The question is whether such value creation would be possible if the principles of private legal relations were cast in stone. Or would it make responding to changes in the social environment considerably more difficult, challenging the EU's ability to create added value?

[1018] For example, if the attempt to regulate private rulemaking while avoiding direct intervention constitutes a transference of judicial power to the private sector. See above Ch. 10.2.3.

recognised in earlier research.[1019] Chapter 10.2 briefly discussed the impact of three milestone judgements adopted by the CJEU in 2014 and 2015 on the dynamic nature of corporate legal governance in the EU. The discussion concluded that the CJEU provides stability for the otherwise dynamic EU law by applying static principles, such as fundamental rights. However, this impact has its limits. The CJEU also emphasises the effectiveness of EU law in its interpretation, as demonstrated by cases from 2012, 2015 and 2018. Chapter 10.2.3 then discussed the static nature of the dynamic principles of the EU, arguing how the dynamic principles, although describing 'the means to an end', are balanced directly against the static principles describing those ends, which constitutes an essential explanatory factor in understanding the legal governance of corporate entities in Europe.

Chapter 10.3 reverted to corporate entities as autonomous legal persons. Chapter 10.3.1 summarised the model of corporate legal personhood, describing how the hybrid model proposed here builds on three competing models: the real entity model, the artificial entity model and the aggregate entity model. Next, it discussed the correspondence of the model with the Company Law Directive adopted in 2017[1020], considering how the Directive complies with the model: While the Directive recognises corporate entities as having legal autonomy, it also recognises the artificiality of corporate entities as legal persons. Chapter 10.3.2 then discussed the extent and limits of corporate legal powers, connecting the discussion with earlier research in the areas of international law and human rights law, mainly the work of Dawn Oliver and Jörg Fedtke (2007) and of Steven R. Ratner (2001). They recognise that the positive legal duties of CEs in horizontal relations are focused on pre-contractual and contractual market relations. However, according to this research, there are no principled arguments against non-contractual liabilities in the European Union, as the *Google Spain* case demonstrated. Instead, there are strong pragmatic reasons for the low level of liabilities: The objective of finding the most cost-efficient solution that supports EU's economic objectives.

Chapter 10.4 discussed more of the implications of these observations, particularly for the coherence and clarity of the EU legal system, recognising the limits of the research, and formulating questions for future research. Firstly, Chapter 10.4.1 concluded how the research had provided a theoretical model of corporate legal personhood, recognising how the model is also applicable to other 'artificial' legal persons. Secondly, Chapter 10.4.2 recognised how many important questions remain unresolved. The regulatory measures studied neither articulate the distinction

[1019] See above Ch. 10.2.1.

[1020] See Dir. (EU) 2017/1132.

between natural and legal persons nor between natural persons as market actors and civic actors. Nor do they clarify the conditions of necessary, proportional and efficient intervention on the fundamental non-market liberties and rights powers of natural persons.

Further research on the topic is necessary to fully understand the legal governance of CEs as market actors. CJEU judgements could presumably shed light on these questions. Nevertheless, the research at hand provides a systematic overview of the legal powers and legal relations of CEs in the EU and a methodology for studying legal relations, i.e. the Hohfeldian typology reviewed. Thirdly, Chapter 10.4.3 briefly discussed the relation of legitimacy and efficacy y. It described how 'trust' and 'fairness' were recognised as conditions for well-functioning markets, raising interesting questions from the perspective of political economy and law. Finally, Chapter 10.4.4 discussed the relations between values and objectives in the EU. It considered whether two parallel but contradictory legal phenomena are at work in the EU: *constitutionalisation of private law* and *constitutional managerialism*. It speculates on the possible negative impact of these divergent developments on the coherence, clarity and efficiency of the EU legal system, calling for future research to understand and resolve issues possibly arising therein. The research concludes with a call for further discussion aiming to build a shared understanding of the nature and role of corporate entities and principles of their legal governance.

11 CONCLUSIONS

In the course of history, companies have played an influential social role. Corporations have been provided with separate legal personhood as well as liberties and rights according to the purpose they serve. As individuals performing public tasks, corporations and their associated natural entities have also been provided with statutory privileges to pursue public interests, such as those provided when opening routes to the riches of new worlds or building America.[1021] Currently, the legal personhood of corporate entities as autonomous legal persons and the liberties, rights and privileges provided are not dependent on performing public tasks *per se*. While certain liberties and rights may be extended only to companies that serve particular public purposes, the recognition of legal personhood for a corporate entity does not necessitate such tasks. Considering how companies are represented in public discourse, it seems that this public side of their origin is sometimes overlooked. However, it is not lost, as the research at hand has demonstrated in relation to the legal governance of corporate entities in the European Union.

There can be various views on the public purpose of corporate entities as autonomous legal persons, and this purpose has undoubtedly changed over time. The societal role and legal governance of corporations is a topic for ideological and doctrinal debate, influenced by economic, political and social changes – particularly the various crises. Peter Oliver (2015), who studied what fundamental liberties and rights belong to CEs according to CJEU case law, emphasised the economic nature of fundamental rights established by the EU, particularly in the case of corporations as legal entities. However, most legal research has focused on the regulation of singular or narrow scope of liberties, rights and duties. Such an approach is essential from a practical perspective but misses the big picture. As the impact of EU law on national legislation has grown significantly, especially in regulatory areas relevant for the legal governance of corporate entities, it is likely to determine the shape corporations as legal entities. Therefore, as the European Union influences all Member States, studying the model of corporate entities carved out by EU law is critical for understanding the role of corporations in Europe.[1022]

[1021] See above Chs. 1.2.3 & 3.1.1.

[1022] See above Ch. 1.1.

The 'model' of corporate entities refers to a theoretical understanding of corporations as autonomous legal persons with legal liberties, rights and duties. Therefore, the objectives of this research were to develop a model for the legal personhood and legal powers of corporate entities applicable in the EU; to analyse the impact of the secondary legislation adopted by the EU during the financial and economic crisis on the legal powers of corporations; and by applying the models to corporate legal personhood and legal power, to identify the key variables determining the legal powers and legal relations of corporate entities in the framework of the EU legal system. The overall aim was to increase our understanding of the role and powers of corporations as legal entities. What better period to do so than the financial and economic crisis of 2008−2014? Although an undesired and overall challenging period in the lives of Europeans, the financial and economic crisis provides an opportunity to study the most fundamental ideas about the nature of corporations as legal entities, the ideas that persisted through a time which challenged the European economic system and indeed the EU itself.

At first, the research introduced three competing models of corporate legal personhood: the real entity model, the aggregate entity model, and the artificial entity model. However, in light of the preceding discussion, all models were problematic when applied to corporate entities. Therefore, the research formulated a hybrid model of corporate legal personhood. It also formulated an reviewed Hohfeldian typology to study the legal powers and legal relations of corporate entities that recognised the trilateral nature of horizontal contractual relations.[1023] This typology was used to analyse the nature of corporate legal powers and legal relations[1024] and the changes wrought by the crisis measures[1025]. It also recognised some key variables that determined those changes.[1026]

The EU Treaties had not undergone any relevant changes during the period observed, nor have they since. Hence, the overall picture of corporate legal powers provided is just as pertinent today as it would have been before the crisis. Based on the systematisation of EU primary legislation and general principles, the research recognised how corporations as market actors enjoy fundamental market liberties and rights necessary to operate on the market, and for-profit corporate entities enjoy the privileges of internal market liberties and the rights required to operate on the internal market. However, they do not enjoy solidarity market rights granted to

[1023] See above Chapter 2.

[1024] See above Chs. 4–6.

[1025] See above Chs. 7–8.

[1026] See above Chs. 8–9.

consumers or employees, nor fundamental non-market liberties and rights, i.e. political and civil rights or social, economic and cultural rights. The research argued that these liberties and rights are non-applicable to corporate entities as these do not possess the necessary qualities such as gender, age, racial or ethnic origin, or human dignity in general. Nor are they considered formally as political actors with civil and political rights.

On the other hand, the research recognised how the legal duties of CEs stem primarily from the general interests, economic and environmental objectives of the Union. However, in horizontal relations, the legal duties of corporate entities were predominantly limited to contractual duties and duties stemming from the solidarity market rights of natural persons with whom the corporation has pre-contractual or contractual market relations.[1027] The research recognised the applicability of the hybrid model of legal personhood to corporate entities, arguing how in the commercial life sphere, corporations with autonomous legal personhood are to all intents and purposes as real as natural persons.[1028] However, corporate entities come to exist as legal persons through *company memoranda* and *statutory legislation*. The legal powers of CEs are determined by the legal powers of the associated entities. Corporate entities as autonomous legal persons exist because the associated entities used their liberties and rights to create a new legal person and transferred some of their own powers to it. Therefore, corporate entities are aggregate entities. However, the States ultimately recognise the legal autonomy of corporate entities through statutory legislation, creating a *legal personhood surplus*. The State may also nullify the CE without the consent of the associated members if the conditions established by law are fulfilled. Thus, corporate entities as autonomous legal persons are ultimately artificial entities. The hybrid model recognises all these various aspects of corporate legal personhood and the differences between corporate entities of different corporate forms. The hybrid model also recognises how the division between public and private is a question of *degree,* not a *dichotomy*.[1029] The hybrid model can also be used to conceptualise the legal personhood of other organisations, such as political parties and other registered associations. It may also have applications when discussing the possible legal autonomy of Artificial Intelligence.[1030]

[1027] Chapters 10.2.2 & 10.4.3 discussed the influence of CJEU's judgement in Google Spain on this principle rule.

[1028] See above Ch. 5.4.3.

[1029] See above Ch. 2.1..3.

[1030] See above Ch. 10.4.1

While corporations are manifestations of individual autonomy and the exercise of civil liberties such as contractual freedom, corporations as legal persons embody social functions even when they are not performing particular public tasks. The research proposed that providing separate legal personhood for corporate entities serves objectives such as economic efficiency, activity and ultimately economic growth and the prosperity of all Europeans. While the research does not claim to be exhaustive in its recognition of various corporate social functions, it suggests that *corporate entities have autonomous legal powers that enable them to do business because it creates social benefits*. Therefore, the statutory recognition of corporate legal autonomy constitutes a positive intervention in the *status quo ante*. Hence, a negative intervention in the legal powers of corporate entities is possible to any level if the social benefits outweigh the social costs. Social costs here include, for example, loss of efficiency and output due to regulatory burden.

The study of measures adopted in response to the social challenges posed and perpetuated by the financial and economic crisis demonstrates this weighing of costs and benefits. The research described how measures aiming to respond to the causes of the crisis utilised norms backed up with sanctions, while measures promoting socially sustainable business utilised less costly measures, such as positive economic incentives and information.[1031] The analysis of the impact of crisis measures on the legal powers and legal relations of corporate entities revealed how the measures significantly influenced the vertical relations between the CE and public powers, particularly in the fields of banking and financial regulation, taxation, and competition law. Changes in horizontal legal relations influenced pre-contractual and contractual relations by increasing corporate legal duties towards consumers, employees and shareholders. An interesting observation is how shareholders are juxtaposed with consumers and employees even though shareholders do not have fundamental rights guaranteed in the Charter of Fundamental Rights of the European Union.[1032] The results correspond to those of earlier research on the instrumental role of solidarity market rights in promoting EU policy objectives such as economic transactions and growth as well as environmental and social sustainability.[1033]

While the research succeeded in presenting an overall picture of corporate entities and their legal governance in the EU, it also recognised how the legislation remains opaque, particularly as regards distinguishing the commercial life sphere from the

[1031] See above Ch. 7 & 8.3.2.

[1032] See Ch. 8.2.

[1033] See above Chs. 10.2.1 & 10.4.3.

non-commercial, the legal person from the natural person, and recognising the protection of the 'core area' of non-market fundamental liberties and the rights of natural persons. In addition, the research recognised the use of declarative statements in the legislation and legislative proposals, 'disclaimer clauses' on how the legislation 'respects the fundamental rights and observes the principles recognised in the Charter of Fundamental Rights of the European Union'.[1034] Moreover, while research on the CJEU judgements could clarify these issues, the question arises as to what such lack of detail does for the coherence, consistency and clarity of the legal system.

On the other hand, such vaguenesses in regulation leave opportunities to reflect and respond according to circumstances, creating a 'regulatory pendulum' already recognised in earlier research.[1035] The regulatory measures adopted in response to the financial and economic crisis reflect a managerial approach to the legal governance of corporations. Union objectives were strongly present in all the measures adopted. Costs and benefits determined legal powers, and extrajudicial factors determined legal relations—prerequisites for financial stability, economic growth and European competitiveness. Extrajudicial variables were also carefully assessed and balanced against to judicial variables. However, this managerial approach is *constitutional*: It emanates from the nature and function of the European Union.[1036] The measures adopted observe the key objectives and principles established in the founding treaties. The crisis measures reflect the ideas and beliefs about creating added value for Europeans enshrined in the EU Treaties.[1037]

The problematic issue is the CJEU's rather opposite approach, extending horizontal legal duties outside (pre-)contractual market relations, nearing the constitutionalisation of private law.[1038] Nevertheless, there is a shared conception about the critical role of corporations in both economic and social life. Corporations hold a prominent position *at the heart of the European Union*. And as far as the policy discussion continues, a common understanding of the basic legal terms—while not solving the problems—makes talking about them more accessible for all parties.

[1034] See above Ch. 8.3.3.

[1035] See above Chs. 10.2.1., 10.4 & 10.5.

[1036] See above Ch. 1.1.

[1037] See above Chs. 8.3.2, 9, 10.2.3 & 10.4.4.

[1038] See above Ch. 10.4.4.

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